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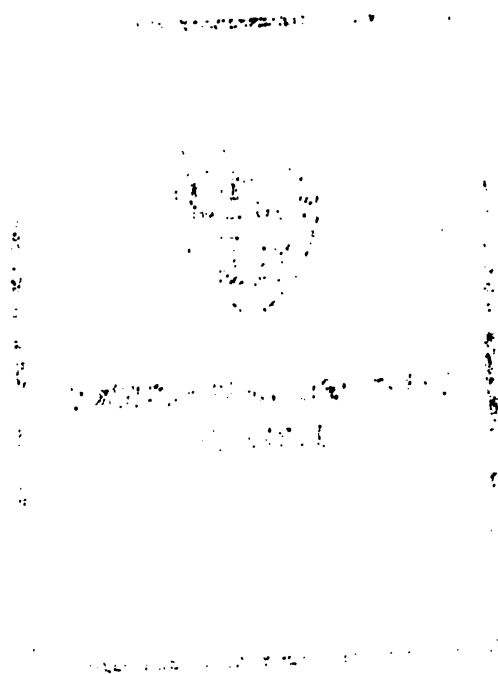
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REPORTS OF CASES

DECIDED IN THE 4

SUPREME COURT

OF THE

STATE OF GEORGIA

AT THE

MARCH TERM, 1905

VOLUME 123

STEVENS AND GRAHAM
REPORTERS

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The State Library
1906

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THE SUPREME COURT.

HON. THOMAS J. SIMMONS, Chief Justice.

HON. WILLIAM H. FISH, Chief Justice.

HON. WILLIAM H. FISH, Presiding Justice.

HON. ANDREW J. COBB, Presiding Justice.

HON. ANDREW J. COBB, Associate Justice.

HON. JOHN S. CANDLER, Associate Justice.

HON. BEVERLY D. EVANS, Associate Justice.

HON. JOSEPH HENRY LUMPKIN, Associate Justice.

HON. MARCUS W. BECK, Associate Justice.

GEORGE W. STEVENS, Reporter.

JOHN M. GRAHAM, Assistant Reporter.

Z. D. HARRISON, Clerk.

LOGAN BLECKLEY, Deputy Clerk.

JAMES W. VAUGHAN, Sheriff.

Chief Justice SIMMONS died on September 12, 1905. Justice FISH was appointed to succeed him. Justice COBB was designated as Presiding Justice of the Second Division, on October 2, 1905.

Justice BECK was appointed on September 14, 1905.

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* Successor to HON. J. I. CARTER, after December 20, 1905.

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CASES

DECIDED IN THE

SUPREME COURT OF GEORGIA

AT THE

MARCH TERM, 1905.

CITY OF ELBERTON *et al.* v. PEARLE COTTON MILLS.

123 1
1129 557

1. While, upon application duly made, equity will enjoin a municipal corporation from taking a water supply from a stream in violation of the rights of a riparian owner further down it, and to his damage, yet when a municipal corporation held an election, in accordance with the constitution, to determine the question of the issuing of bonds for the construction of a system of waterworks, and, after a favorable vote, issued and sold the bonds, purchased land bordering on the stream some three miles from its corporate limits for the purpose of obtaining water from it, built a pumping station and laid pipes in the city and connected it with the stream, an owner of land bordering on it some miles further down its course, who knew all the facts and the intention to use water therefrom, but made no objection thereto, and waited to apply for an injunction until the works were completed and in operation, is not entitled to an interlocutory injunction to stop the continuation of the operation of the waterworks; especially where the evidence of whether there will be any damages is conflicting.
2. The question here determined was not involved or decided in the case of *City of Elberton v. Hobbs*, 121 Ga. 749, 750, or in *Chestatee Pyrites Co. v. Cavenders Creek Co.*, 118 Ga. 255.
3. Where the complaining riparian owner was a corporation having but three stockholders, who were also its officers, knowledge by them of the facts stated in the first headnote above affected the company.

Submitted April 18, — Decided May 12, 1905.

Injunction. Before Judge Holden. Elbert superior court.
March 3, 1905.

The Pearle Cotton Mills, a corporation, as the owner of certain land through which flows a creek, and of a mill operated thereby, filed its petition against the City of Elberton and its mayor, seeking to enjoin the taking of water from the creek to supply the city, which it was alleged was about to be done at a point on the

stream above the land of the plaintiff. Resulting damage to its property was alleged. Defendants admitted the intention to use water from the stream, but denied that any injury would result to the plaintiff therefrom. They further alleged, that the city had advertised and held an election for the purpose of determining whether bonds should be issued to construct the waterworks; that the election having resulted in favor of bonds, they were issued and sold to the amount of \$40,000, that thereupon the city began to purchase land on the creek at a point where it has since taken water, for that purpose, and proceeded to purchase pipe and machinery, and to employ hands and contractors to build and complete its waterworks, and to dig ditches in the city and lay pipes connecting it with the creek; that the whole work was completed at an expense of about \$50,000; that the waterworks were in actual use, and the water was being pumped from the creek into the city before the petition for injunction was presented; that the plaintiff and its officers and stockholders had full knowledge of all the facts, and stood by without objection or doing anything to put the city on notice that any injury would result, or damage for trespass would be claimed. The answer alleged (and there was no denial thereof) that there were but three stockholders of the plaintiff, who were also respectively president, vice-president, and secretary and treasurer. There was no direct denial that they had knowledge of the facts pleaded by the defendant. Two of them testified, that "said city never notified petitioner that it intended to use said creek for said waterworks, and certainly petitioner had no notice that if it intended so to do it would not, before undertaking to withdraw said water, either acquire a right by proper agreement or through the exercise of the power of eminent domain." One of them testified that he did not know that the defendants or their agents had pumped or were pumping water from said creek before this suit was filed, and never learned of it until afterward. Another testified, that the City of Elberton had not condemned or sought to condemn any right, title, or easement to withdraw water from the creek, and that neither the mill nor any one for it had granted any such right to the city. An injunction was granted, and the defendant excepted.

J. N. Worley, for plaintiff in error. *T. J. Brown*, contra.

LUMPKIN, J. (After stating the facts.) 1, 2. While it is true that upon proper application, made in due time, equity will enjoin a municipal corporation from taking a water supply from a stream, in violation of the rights of a riparian owner further down such stream, and to his damage (*City of Elberton v. Hobbs*, 121 Ga. 749, 750); nevertheless the complaining owner must act with reasonable promptness. If he waits until the municipal corporation has sold bonds, bought land bordering upon the stream at a point above his property for the purpose of constructing waterworks and using water from the stream, and until at large expense a system of water-pipes has been laid from the stream to the city and through the streets, and, though having full knowledge of all the facts, makes no objection, gives no notice of any claim of injury, and begins no proceeding till after the pipes have been connected with the stream, and the waterworks have actually begun operation, he is not entitled to an interlocutory injunction which will stop the use of the water by the city. This is especially true where the evidence as to whether any damage would result to the property or not is conflicting. The point here determined was not raised or decided in the case of the *City of Elberton v. Hobbs*, supra (which was begun some months earlier), or in *Chestatee Pyrites Co. v. Cavenders Creek Co.*, 118 Ga. 255. See *Griffin v. Augusta & Knoxville Railroad*, 70 Ga. 164; *Wood v. Macon & Brunswick Railroad*, 68 Ga. 539; *Darnell v. Southern Marble Co.*, 94 Ga. 231 (4); 2 Pom. Eq. Jur. (2d ed.) § 817; 3 Id. § 1359; 1 Beach, Inj. § 44; 1 High, Inj. (3d ed.) § 7.

3. There being but three stockholders of the plaintiff, who were also its officers, knowledge by them of the facts affected the company with knowledge. *Ga. R. Co. v. Hamilton*, 59 Ga. 174 (3); *Mitchell v. Southwestern Railroad*, 75 Ga. 398; s. c. 69 Ga. 114, 124; *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511.

Judgment reversed. All the Justices concur, except Candler, J., absent.

SANDERS v. THOMPSON, administrator.

One whose interest in property depends upon the terms of a will does not, by a deed from the executor, purporting to be executed pursuant to the requirements of the will, acquire any greater interest than would pass under the will. Nor can such a deed be used as color to lay the foundation of a prescriptive title against the claims of those whom the grantee was bound to recognize as the owners under the terms of the will.

Argued April 14, — Decided May 12, 1905.

Equitable petition. Before Judge Russell. Banks superior court. October 31, 1904.

W. W. Stark and Oscar Brown, for plaintiff in error.

Fletcher M. Johnson, contra.

COBB, J. This is the third appearance here of this controversy. In *Thompson v. Sanders*, 113 Ga. 1024, it was held that Sanders was a cotenant with Thompson, and that a suit brought by Sanders to recover exclusive possession of the entire property was properly dismissed on demurrer. In *Thompson v. Sanders*, 118 Ga. 928, it was held that the trust under the will of Nathan Sanders, created for the benefit of the wife of the plaintiff in error and her children, was executed as to the wife when the will took effect, and became executed as to the children when they respectively became of age; and that the intestate of the defendant in error, having acquired the interests of the children by conveyances executed by them after their majority, was the owner of a fifteen-sixteenths interest in the property, and the plaintiff in error the owner of a sixteenth interest acquired by inheritance from his wife, and that he had no further interest in the property. This ruling is conclusive upon the rights of the plaintiff in error on the facts as then before the court. The only new fact which has been introduced is that the executor of Nathan Sanders made a deed to the plaintiff in error, and that he has been in possession for more than seven years since this deed was executed. He attempts now to set up a prescriptive title as against the defendant in error. The will did not in express terms require the executor to make such a deed; nor was there any law requiring him to do so. The will itself was a muniment of title; and the deed made was simply a recognition by the executor of whatever interest the grantee took under the will. It did not purport to en-

large or diminish the rights of the grantee. If available as color of title at all, it was simply color as to the rights under the will, whatever they might be. It could not be used as the foundation for prescription to defeat those who claimed under the will. There was no error in directing a verdict and terminating this litigation.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

WESTERN AND ATLANTIC RAILROAD COMPANY. v. ROBINSON.

LUMPKIN, J. This being the third verdict rendered in favor of the plaintiff, and some evidence having been introduced on the last trial which was not before the court on the two former trials (*Western & Atlantic R. Co. v. Robinson*, 114 Ga. 159; 119 Ga. 331), and the evidence upon the last trial being sufficient to sustain the verdict, the question of credibility in matters of conflict being for the jury, and the presiding judge having approved the verdict, this court will not interfere.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Argued April 15, — Decided May 12, 1905.

Action for damages. Before Judge Fite. Catoosa superior court. October 17, 1904.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error.

Payne & Payne, contra.

TURNER, administrator, v. TURNER.

1. As a general rule, the declarations of an agent are not admissible against his principal, unless they are made as a part of the transaction being carried on in behalf of the principal and constitute a part of the *res gestæ*.
2. Declarations of an agent, in the nature of entries made in the regular course of the business of the principal, are, after the death of the agent, admissible against the principal in some cases not strictly within the rule above referred to.
3. Declarations of a person since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case.
4. The provisions of the Civil Code, § 3034, that the declarations of an agent "as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead," are merely declaratory of the law existing at the time the code was adopted. The words "or else the agent be dead" refer to entries made by an agent since deceased, in the regular course of the

business of his principal, or declarations made by a person since deceased, against his interest, or other instances where, under the established rules of evidence, the declarations of a deceased person might be admitted in evidence.

5. Declarations or entries made by one since deceased, against his interest, when admitted, are evidence as to any fact stated therein which was within his knowledge or which it was his duty to know.
6. The mere fact that an agent employed to negotiate a loan is an attorney at law, and in securing the loan performs duties ordinarily performed by an attorney, will not make the relation existing between the borrower and such agent that of attorney and client, so as to render the agent an incompetent witness against the borrower as to matters which came to his knowledge pending the negotiation of the loan.
7. An allegation of agency may be established by evidence showing the existence of the relation of principal and agent in any of the methods recognized by law as establishing this relation.
8. There was evidence authorizing the verdict, and no sufficient reason has been shown for reversing the judgment refusing a new trial.

Argued April 21, — Decided May 12, 1905.

Complaint. Before Judge Henry. Floyd superior court.
September 9, 1904.

The action was by Sallie F. Turner against J. D. Turner and Susie B. Turner. The petition alleged, in substance: J. W. Turner died intestate, leaving as his heirs at law his widow and four children, one of whom was J. D. Turner. The widow and the children procured a loan of \$1,200 from the plaintiff, to be used with other money in discharging a mortgage of the intestate on certain realty; the mortgage was transferred to the widow, and she assigned it to the plaintiff as security for the payment of this loan. It was agreed among the heirs that the amount so advanced should be divided into four parts and borne by all of them. J. D. Turner's part was \$316. The land was divided among the heirs, and J. D. Turner conveyed his part to his wife, Susie B. Turner. Subsequently he represented to the plaintiff, for whom he was acting as agent, that his wife desired to obtain a loan, that in order to do so it was necessary to obtain a cancellation of the mortgage as to that part of the property, and that in consideration of the cancellation she would pay the plaintiff, from the money to be borrowed, the proportionate amount due the plaintiff by him. Acting upon this representation, the plaintiff signed a release of the mortgage as to that part of the property, and Susie

B. Turner obtained a loan of \$1,250, but failed and refused to pay the amount due the plaintiff. Susie B. Turner received this money with full knowledge of the representation and promise made by her husband. By reason of all these facts J. D. Turner and Susie B. Turner became indebted to the plaintiff in the sum of \$316 as principal, with interest from February 15, 1894; for which judgment was prayed. Susie B. Turner answered, denying liability. J. D. Turner did not answer. Both defendants died. Susie B. Turner's administrator was made a party, and the suit proceeded against him alone. The trial resulted in a verdict for the plaintiff. The defendant excepted to the overruling of his motion for a new trial.

M. B. Eubanks, for plaintiff in error. *Dean & Dean*, contra.

COBB, J. 1-4. It is an ancient and well-established rule of law, that the declarations of an agent are not admissible against his principal, unless they were made at a time when the agent was engaged in some transaction within the scope of his agency and was acting in behalf of his principal. To state it otherwise, the declaration must be one accompanying an act within the scope of the agency and so nearly connected therewith as to become a part of the *res gestæ*. Story on Ag. (9th ed.), § 134 et seq.; 1 Gr. Ev. (16th ed.) § 184 c; 2 Evans' Pothier on Obligations (3d Am. ed.), 245; Chamberlayne's Best on Ev. (Int. ed.) 487; 1 Enc. Ev. 538 et seq. Such was the recognized rule in this State at the time the Code of 1863 was adopted. *Griffin v. Railroad Co.*, 26 Ga. 111; *Sweetwater Mfg. Co. v. Glover*, 29 Ga. 399; *Atlanta Railroad Co. v. Hodnett*, Id. 461. There is also an equally well-established rule, that entries made by one whose duty it is to make them, in the regular course of business, are admissible after his death; and this rule applies in the case of an agent who makes such entries in the course of the business of his principal. 1 Gr. Ev. (16th ed.) § 120 a; Starkie on Ev. (10th Am. ed.) 492 et seq.; 4 Enc. Ev. 103-104. Such entries may in many cases be a part of the *res gestæ*; but there are also instances where such would not be the case, but after the death of the agent who made such entries they are nevertheless admissible. There is still another ancient and well-established rule, that declarations against interest by one since deceased are admissible in evidence in a con-

troversy between third persons. 1 Gr. Ev. (16th ed.) § 147 et seq.; 9 Am. & Eng. Enc. L. (2d ed.) 8; 4 Enc. Ev. 87; Starkie on Ev. (10th Am. ed.) 474; Chamberlayne's Best on Ev. (Int. ed.) 453. This rule is set forth in the code in the following language: "The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case." Civil Code, § 5181. In that section of the code which provides for the admission in evidence of books of account, the rule that the entries of an agent, made in the course of the business, are admissible in evidence after his death, is recognized, it being there provided that the person offering the books of account must show either that he kept no clerk, or else that the clerk is dead or inaccessible, or incompetent as a witness. Civil Code, § 5182. The code also declares that the "admissions of an agent or attorney in fact, during the existence and in pursuance of his power, are evidence against the principal." Civil Code, § 5192. In another section it is declared: "The agent is a competent witness for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead." Civil Code, § 3034. If this section be isolated and no regard paid to other provisions of the code on the subject of the admission of evidence, and no attention paid to the ancient and well-established rules of law above referred to, which were of force in this State at the time of the adoption of the first code, the concluding words of the section might be held to mean that the mere fact that the agent was dead would be sufficient to admit in evidence against the principal any declaration made by the agent, without reference to the time or place at which or the circumstances under which the declaration was made. Such a rule would have for its foundation neither principle nor precedent. When we look at other provisions of the code in reference to the admissibility of evidence, and at what were the well-established rules of evidence at the time the code was adopted, we are forced to the conclusion that no such radical change in the law was intended as such a construction would place upon this section of the code. It is in this State a well-established rule of code

construction, that a given section will be presumed to be simply a declaration of existing law, unless the language of the section is such as to clearly indicate an intention to establish a new rule. *Mitchell v. Ry. Co.*, 111 Ga. 760, 768; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 205. Of course the words of a section must not be held to be meaningless. The courts have no right by construction to eliminate words which have meaning, simply because the meaning does not agree with the opinion of the court as to what should be the law. Can the words, "or else the agent be dead," be given a meaning and at the same time make the section of the code merely declaratory of existing law? In our opinion this can be done. The first portion of the last sentence of the section was intended to declare the well-settled rule, above referred to, that the declarations of an agent, to be admissible, must be a part of the *res gestæ*. The concluding words of the sentence, "or else the agent be dead," are to be interpreted in the light of those provisions of the law where the declarations of deceased persons are admitted in evidence, that is, if under established rules the declaration of a deceased person would be admissible in evidence, then under the code such declaration would be none the less admissible because the deceased was occupying the relation of an agent at the time the declaration was made. If the declaration was one made by an entry in the regular course of business but still not a part of the principal transaction, and therefore not admissible as a part of the *res gestæ*, such declaration would be admissible, if at the time it was offered it was shown that the agent was dead. So if the agent in the regular course of business, but not as a part of the principal transaction so as to be a part of the *res gestæ*, made a declaration which was against his interest, then the fact that he was an agent would not make an exception to the general rule which admits the declarations against interest of a person since deceased. Giving to the words under interpretation this meaning, the provisions of the code on the subject of the admission of the declarations of an agent harmonize with the general rules of law which are stated in the code, and also with the well-established principles of evidence which were of force at the time the code was adopted. So far as the ruling in *Hines v. Poole*, 56 Ga. 638, a decision by two Judges, is in conflict with these views, we must decline to follow it.

5. J. E. Dean, Esq., a witness for the plaintiff, was permitted to testify as follows: "In August, 1899, I was riding with Mr. J. Dallas Turner. He and I were on a trip together; and in the course of the conversation he says to me, 'Ed. I am trying to borrow some money for Susie on the property I got from my father's estate, which I have deeded to her. I am trying to borrow twelve hundred or twelve hundred and fifty dollars, and in order to do so it is necessary to get the mortgage which Sallie holds (referring to plaintiff) canceled; and out of the money we borrow we will pay her back the part of that \$1,200 that I owe her.'" This evidence was objected to on the ground that there was no evidence showing that J. Dallas Turner was the agent of his wife, the defendant; that it did not appear that the conversation was communicated to the plaintiff or was in the hearing of either party to the case; and that it was immaterial and irrelevant. It appears from the evidence that J. Dallas Turner was dead at the time of the trial. While there is in the record evidence sufficient to authorize a finding that Turner was the agent of his wife, still, for the reasons set forth in the preceding division of this opinion, this evidence would not have been admissible as the declarations of an agent. But we think the testimony was admissible as the declarations of a third party, since deceased, against his interest, made at a time when the litigation could not have been in contemplation. The declarant in terms admits his liability to the plaintiff for a part of \$1,200. This is clearly a declaration against interest, and sufficient to render not only this portion of the declaration admissible, but also all that was said at the time relating to any fact which was within the knowledge of the declarant or which it was his duty to know. Declarations admitted under this rule of evidence are, at the trial, to be dealt with as if the witness were on the stand testifying to the facts stated in the declaration. If the declarant were in life and called as a witness, he certainly would be allowed to testify that he and his wife were making arrangements to borrow money to discharge a lien upon the land which he had conveyed to his wife, and that out of the money to be borrowed both the husband and wife intended to discharge the lien upon the land. Whether this testimony would be sufficient to show an assumption on the part of the wife of the amount of the lien upon her land would be a question for the jury under all the

facts and circumstances of the case; but the evidence was clearly admissible under the rule, to be given such weight as the jury saw proper to give it. See *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297.

6. W. J. Neel, Esq., was called as a witness for the plaintiff and was permitted to testify to a conversation between J. Dallas Turner and his wife in reference to the payment of the claim of the plaintiff out of money the proceeds of a loan which the witness had negotiated for Mrs. Turner. He was also permitted to testify to other matters in connection with the negotiation of this loan. This evidence was objected to on the ground that the relation of attorney and client existed between the witness and the defendant, and that therefore the witness was not competent to testify in reference to any matter knowledge of which he derived on account of the professional relation claimed to exist between the parties. It appeared that Mr. Neel carried on, in connection with the practice of his profession as an attorney, the business of a negotiator of loans; that he was authorized by the company which he represented to receive applications for loans; that these applications were transmitted to the company, and if the security offered was satisfactory the loan would be accepted, and the money would be sent to Mr. Neel, who, after deducting such sums as had been agreed upon between him and the applicant for expenses and commissions, would pay over the net proceeds to the applicant. It is clear from the testimony that Mr. Neel bore that relation to the applicant and the loan company which has become so familiar to every one in this State. He was the agent of the applicant, and not the agent of the lender. But he was expected by the lender, on the acceptance of the application, to see that the applicant had an unincumbered title to the property, and if there were incumbrances it was his duty to see that these incumbrances were removed before any portion of the money was paid over to the applicant. He owed a duty to the applicant, as agent, to do every act that was legitimate and proper to secure the acceptance of the loan. In the performance of these duties it would become necessary for him to exercise his knowledge and information as an attorney at law, but he was really not employed as an attorney, but simply as an agent who, on account of the fact that he was also an attorney, might discharge the duty

that was owing to the applicant without calling for the services of another person. Really the duties which he was to perform as an attorney were more for the protection of the lender; and if the relation of attorney and client existed at any stage of the transaction, it would be one rather existing between the attorney and the lender than between the attorney and the applicant. The purpose of the applicant was to secure a loan. The person whom she was seeking was a loan agent, and not an attorney, and Mr. Neel's employment was in the capacity of a loan agent rather than in that of attorney at law. The fact that, in discharging the duty that he owed to the applicant as a loan agent, the performance of a duty which could be fulfilled only by an attorney might to some extent be involved would not make the relation one of attorney and client rather than that of principal and agent. The main employment was to secure a loan, and it was not at all necessary that the agent for this purpose should be an attorney at law. It was merely an incident to the performance of the duties of the loan agent that the knowledge of the law had to be invoked; and while the agent might do that which only an attorney at law could do, incidental to the completion of the purpose for which he was employed as agent, this incident to the agency would not destroy the relation of simple principal and agent and make the relation one of attorney and client. This was the view taken by this court in *Skellie v. James*, 81 Ga. 419, in which the testimony of Judge Miller, who occupied a relation to the transaction then under investigation similar to that which Mr. Neel occupied in the present case, was held to be admissible. In *Freeman v. Brewster*, 93 Ga. 652-653, where it was held that the testimony of an attorney at law was not admissible, the case of *Skellie v. James* was distinguished, upon the ground that it there appeared that the knowledge of the attorney as to the loan about which he was introduced as a witness was acquired, not as attorney for the borrower, but as attorney for the lender, who was not a party to the case. See also, in this connection, *Jackson v. Bennett*, 98 Ga. 106 (2); *Stone v. Minter*, 111 Ga. 45 (1).

7. The charge of the judge contained the rules as to a principal being bound by the ratification of unauthorized acts of his agent, and as to the liability of an undisclosed principal. Error was assigned upon these portions of the charge, upon the ground that

there were no averments in the petition authorizing such instructions. The petition charged in terms that J. D. Turner was the agent of Susie B. Turner in reference to the matters as to which the plaintiff sought to hold her liable; and this allegation could be proved by showing any state of facts which the law would recognize as establishing agency; and as there was evidence tending to establish each of the propositions referred to in the instructions, there was no error in the portions of the charge complained of.

8. The foregoing discussion embraces such of the assignments of error as require any elaborate notice. The plaintiff's case was predicated upon the theory that J. D. Turner was the agent of Susie B. Turner. While there was an allegation that J. D. Turner was insolvent, this was an unnecessary and immaterial allegation, and the failure to sustain it by proof would not cause the plaintiff's case to fail, if the other averments which were material were established to the satisfaction of the jury. The charge, when construed as a whole, fairly submitted to the jury the controlling issues in the case, and those portions which were excepted to were not erroneous for any of the reasons assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge. If there was any error at all in the charge, or in the rulings on evidence, such error was not of sufficient importance to require the granting of a new trial. There was evidence upon which a finding that J. D. Turner was the agent of Susie B. Turner in the transaction involved could properly be based; and this appearing to have been the second verdict in the case, and one which seems to us to be so consistent with the real truth and justice of the case, we do not think there was any sufficient reason, either for the trial judge to grant a new trial, or for us to control whatever discretion he may have had at this stage of the case in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

MONTGOMERY v. KING, for use, etc.

123	14
124	947

- EVANS, J. 1. Where a petition does not set forth the cause of action in orderly and distinct paragraphs numbered consecutively, this defect in form may be cured by amendment, as was done in the present case.
2. In a proceeding to foreclose a mortgage, the law does not contemplate that process shall be issued by the clerk of the court as in ordinary suits (Civil Code, § 4974), but expressly provides that the judge of the superior court shall, upon petition, summarily grant a rule nisi against the mortgagor, directing the principal, interest, and costs to be paid into court on or before the first day of the term next succeeding that at which the rule is issued; which rule shall be published once a month for four months, or served upon the mortgagor at least three months previous to the time at which the money is directed to be paid into court. Civil Code, § 2743. The rule nisi is the process under which service upon the mortgagor is perfected and jurisdiction over his person acquired. *Stiles v. Elliott*, 68 Ga. 83; *Falvey v. Jones*, 80 Ga. 131.
3. A mortgage transferred by written assignment may be foreclosed in the name of the mortgagee, suing for the use of the assignee. Civil Code, § 2745. In such a case, the mortgage is the instrument declared on, and it is unnecessary to set forth the terms of the written assignment or to attach a copy thereof to the petition. Civil Code, § 4963.
4. In so far as the objections raised by special demurrer to the plaintiff's petition were well taken, they were met by appropriate amendment, and the court properly refused to dismiss the plaintiff's action.
- Judgment affirmed. All the Justices concur, except Candler, J., absent.*

Argued April 21, — Decided May 12, 1905.

Foreclosure of mortgage. Before Judge Henry. Floyd superior court. September 8, 1904.

Henry Walker, for plaintiff in error.

Fouché & Fouché and *M. B. Eubanks*, contra.

RAGAN v. STANDARD SCALE COMPANY.

1. A city court has no jurisdiction to grant affirmative equitable relief; nor can such jurisdiction be conferred upon it by consent of parties.
2. Where in a claim case pending in a city court the claimant made an amendment to its claim, seeking affirmative equitable relief, and the judge of the city court molded his judgment accordingly, this court, upon ascertaining the fact, will reverse the judgment so rendered.

Argued April 21, — Decided May 12, 1905.

Levy and claim. Before Judge Hamilton. City court of Floyd county. September 20, 1904.

123	14
Case 2	
123	786

123	14
Case 2	
128	336

A mortgage *fi. fa.* in favor of R. J. Ragan against Lester Corley was levied on certain personal property, and a claim was interposed thereto by the Standard Scale Company. The claim was returned to the city court of Floyd county. The claimant filed an equitable amendment to his claim, alleging, in brief, as follows: On May 26, 1902, Corley executed and delivered to the Exchange Bank of Rome three notes for the principal sum of \$80 each, and to secure them executed a mortgage to the bank, covering the property levied on. It was duly recorded. Afterward Corley executed and delivered to Ragan a mortgage covering the same property, along with other property. This was dated October 7, 1902, and was duly recorded. The note and mortgage given to the bank were in part for the purpose of raising \$165, with which to pay the Battie Machinery Company for the property in dispute, for which balance of purchase-money the machinery company held notes reserving title. During the month of November, 1902, the scale company bought the property claimed from Corley, for \$200. Out of the purchase-price it paid the bank \$160, being balance due it on the note and mortgage held by it. Upon receipt of this sum the bank cancelled its mortgage and surrendered it to Corley. He is insolvent, has left the State, and his whereabouts are unknown to the claimant. The prayer was as follows: "Wherefore, the premises considered, said Standard Scale Company prays that it be subrogated to the rights of said bank, as against said property; that said R. J. Ragan be required to pay the said Standard Scale Company the sum of \$160, with eight per cent. per annum interest thereon from November 6, 1902; that upon failure to pay said amount, with interest, that said property be found not subject to the lien of the said mortgage held by said Ragan; that said Standard Scale Company have such other and further relief as to the court may seem just and equitable." The case was submitted to the judge of the city court without a jury, upon an agreed statement of facts. He rendered the following judgment: "This case having been submitted to the court upon an agreed statement of facts, after hearing argument of counsel, it is considered, ordered, and adjudged by the court that the property levied upon and claimed in said cause be and the same is hereby found not subject to the lien of plaintiff's *fi. fa.*, unless plaintiff in *fi. fa.* pay over to claimant, within thirty days from the date hereof, the sum of one

hundred and sixty dollars, with eight per cent. interest thereon from November 6, 1902. Should plaintiff pay said sum within said time, then said property shall become subject to the lien of plaintiff's fi. fa." To this judgment the plaintiff in fi. fa. excepted.

Charles E. Davis and McHenry & Maddox, for plaintiff
Dean & Dean, contra.

LUMPKIN, J. (After stating the facts.) The claimant in this case made an amendment to its claim, in which it sought affirmative equitable relief. The judge of the city court by his judgment sought to grant it. A city court in this State is without jurisdiction to grant such relief. *English v. Thorn*, 96 Ga. 557; *Fowler v. Preferred Accident Insurance Co.*, 100 Ga. 330, 334; *Moore v. Medlock*, 101 Ga. 100; *Hecht v. Snook & Austin Furniture Co.*, 114 Ga. 921. In the present case the parties appear to have proceeded before the judge of the city court by agreement. "Consent of parties, however, can not give a court jurisdiction of a subject-matter when it has none by law; and when this court discovers from the record that the judgment has been rendered by a court having no jurisdiction of the subject-matter, and the case is brought here for review upon writ of error, this court will of its own motion reverse the judgment. If the judge has refused to entertain the motion, and that ruling has been excepted to and brought here for review, this court will, on motion or ex mero motu, dismiss the writ of error." *Smith v. Ferrario*, 105 Ga. 51, 53, 54. The subrogation sought to be asserted was not of a purely legal character, such as may arise in favor of a surety who pays off in whole or in part a judgment or execution against his principal and has the fact of such payment duly entered. Civil Code, § 2986. The claimant desired to revive a cancelled mortgage, to assert equitable rights and obtain equitable relief; and the judge of the city court endeavored to mold his judgment accordingly. The amendment should have been stricken; and the judgment is reversed, with direction that this be done.

Judgment reversed with direction. All the Justices concur, except Candler, J., absent.

PHILLIPS *v.* DuBIGNON *et al.*

SIMMONS, C. J. Under the peculiar facts of this case the judge did not abuse his discretion in modifying the injunction prayed for by the plaintiff, so as to give the defendants time to extend the sewer and abate the nuisance, instead of ordering that the sewer be closed at once, which would have probably caused the college to be closed on account of the health of the students.
Judgment affirmed. All the Justices concur, except Candler, J., absent.

Argued May 1,—Decided May 12, 1905.

Injunction. Before Judge Lewis. Baldwin superior court.
February 2, 1905.

Hines & Vinson, for plaintiff.
Allen & Pottle, for defendants.

HUBBARD *v.* THE STATE.

1. When the statute makes it penal for any person to play and bet for money, or other thing of value, "at any game played with cards, dice, or balls," an indictment is not demurrable because it alleges that the defendant played and bet for money and other things of value at a game played with "cards, dice, and balls."
2. Under an indictment charging that the defendant played and bet money and other things of value at a game played with cards, dice, and balls, it is sufficient to support a conviction if the evidence shows that he played and bet money at a game played with cards alone. (FISH, P. J., dissents.)
3. Under the ruling in *Pullen v. State*, 116 Ga. 555, where several persons were jointly indicted by name for the offense of gaming, and it was not alleged that others or unknown persons participated in the game, a conviction of one of the named persons was not authorized by evidence which did not disclose that any of those jointly indicted with him were connected with the transaction.

Submitted April 17,—Decided May 13, 1905.

Indictment for gaming. Before Judge Henry. Walker superior court. March 8, 1905.

Bale & Shaw, for plaintiff in error.
W. H. Ennis, solicitor-general, contra.

LUMPKIN, J. Hubbard was indicted for gaming, it being charged that he "did unlawfully play and bet for money and other things of value at a game played with cards, dice, and balls." A demurrer to the indictment was overruled. After conviction he

moved for a new trial, and, upon a refusal thereof, excepted. On the trial only one witness was introduced, who testified, that he went on a raid after gamblers, and on entering a room about ten o'clock at night saw some negroes sitting around an old canvas cot on which were lying some cards, and a few nickels and dimes, that he made a grab for the money, and the negroes did likewise and that the defendant was one of the party. He said, "I did not see any dice or balls." The witness did not identify any of the parties present except the defendant.

1, 2. An indictment under section 401 of the Penal Code may charge in one count conjunctively that the defendant played and bet at a game played with cards, dice, and balls, without being subject to demurrer. At the trial the offense could be established by proof of playing and betting at a game played with either cards, dice, or balls. *Wingard v. State*, 13 Ga. 396; *Eaves v. State*, 113 Ga. 749 (5); *Cody v. State*, 118 Ga. 784; *Brand v. State*, 112 Ga. 26; 1 Bish. New Cr. Proc. § 436; Bish. Stat. Cr. (3d ed.) § 244. Had the indictment charged the offense as having been committed in one of several ways, in the alternative, it would have been more open to objection. *Grantham v. State*, 89 Ga. 121; *Eaves v. State*, supra; *Henderson v. State*, 113 Ga. 1148. This ruling in no way conflicts with the decisions in *Langston v. State*, 109 Ga. 153, and *Long v. State*, 12 Ga. 293. In so far as the remark in *Woody v. State*, 113 Ga. 927, 928, may appear to conflict with the decisions herein cited, it is not authority.

3. It has been held that it is not now necessary in this State to allege with whom the gaming took place. *Hinton v. State*, 68 Ga. 322; *Brand v. State*, 112 Ga. 25. But if an indictment jointly charges the defendant and other named persons with the offense of gaming, without charging that others participated in the act specified, the conviction is not sustained by evidence which merely indicates that the defendant participated in a game with certain persons, but fails to show that any of the other joint defendants were engaged in it. *Pullen v. State*, 116 Ga. 555; *Woody v. State*, 113 Ga. 927; *Grant v. State*, 89 Ga. 293 (4). Under these rulings the judgment is not supported by the evidence.

Judgment reversed. All the Justices concur, except Candler, J., absent.

FISH, P. J., concurring specially. While I concur in the judgment rendered, I can not agree to the proposition, stated in the second headnote and announced in the opinion, that where an indictment for the offense of gaming charged the accused with playing "at a game played with cards, dice, and balls," evidence that he played a game with cards only authorized a conviction. The charge was that the offense was committed in a particular way, that is, "at a game played with cards, dice and balls." The descriptive averments of the manner in which the game was played were essential elements of the particular offense charged, and, according to the well-settled rule of pleading, should have been proved as laid. In *Woody v. State*, 113 Ga. 927, the exact point here involved was distinctly ruled. In that case the indictment was for gaming, and charged the accused with playing and betting at divers games "played with cards and dice." It was held that a conviction was not warranted, when there was no evidence that the accused played and bet at a game played with both cards and dice. It is true that it was held that the verdict was not warranted, for another reason, but the decision was distinctly put on both grounds. In my opinion, the ruling in that case was not at all in conflict with any of the previous rulings of this court, nor with the principle stated by Bishop, cited in the opinion of the majority in the present case. Of the cases decided by this court, cited to support the decision now rendered, *Wingard v. State*, 13 Ga. 396, and *Eaves v. State*, 113 Ga. 749, seem more nearly in point than the others. In *Wingard's* case, the indictment charged that the accused played and bet with cards for money, "at a game of poker, whist, faro, seven up, three up, and other games played with cards." The words, "poker, whist, faro," etc., were each descriptive of a separate and particular game, and especially so when used in connection with the expression, "and other games played with cards." That each of these words was descriptive of a distinct and separate game was shown by the statute itself under which the accused was indicted, which enacted that "if any person shall play and bet for money, "or any other things of value, at any game of faro, loo, brag," etc., "or any other game or games played with cards," he shall, on conviction, be fined, etc. In the *Eaves* case it was held that where an indictment charged the accused with unlawfully selling "spirituous, vinous, and malt liquors,"

proof that he unlawfully sold any one of such liquors would support a conviction. If the indictment in that case had charged the unlawful sale of a given quantity of spirituous, vinous, and malt liquor, and the proof had shown the unlawful sale of a given quantity of malt liquor alone, I apprehend that a conviction would not have been sustained; yet such a case would have been more like the one in hand than the real case there made. As I understand the ruling in that case, it was that the indictment charged the accused with unlawfully selling spirituous liquor, vinous liquor, and malt liquor; that is, that he was charged with unlawfully selling all three kinds of liquor, and, therefore, proof that he unlawfully sold any one of them was sufficient to sustain a conviction. If a merchant were to advertise to sell woollen, linen, and cotton goods, I think it would be generally understood that he offered to sell three kinds of goods, to wit, woollen goods, linen goods, and cotton goods. But if he were to advertise to sell cloth made of, or "with," wool, flax, and cotton, I think it would be well understood that he proposed to sell a particular kind of cloth composed of all three of these materials. If the indictment in the present case had charged that the accused played and bet at a game played with cards, a game played with dice, and a game played with balls, proof that he played at a game in which cards alone, or dice alone, or balls only were used would sustain a conviction; but "a game played with cards, dice, and balls" is a different thing from a game played with cards only, dice only, or balls alone. The *Eaves* case was decided on July 18, 1901, and the *Woody* case on July 20, 1901. It would be rather singular if only two days after the ruling was made in the *Eaves* case, this court had, in the *Woody* case, rendered a decision in conflict therewith. But, as said above, I do not think there is any conflict between the two.

ROSIER v. NICHOLS.

In January, 1874, Samuel Pearson conveyed certain land to Doris, trustee, "for the sole and separate use of" the wife of the grantor, Mary Pearson, "for and during her natural life, and after her death to such child or children by [the grantor] as she may leaving surviving her at her death, share and share alike; with power to the said Mary Pearson to empower the said Doris or his successors in the trust, by writing under her hand, to sell any part or

the whole of said trust estate and to reinvest the proceeds in such other property, subject to the above-described trusts, as he or his successor or successors may deem most to the interest of said trust estate, without the aid or intervention of any court whatever being necessary. And with power also to the said Mary Pearson, if she shall die leaving no child or children by [the grantor] living at the time of her death, to limit and appoint by her written will and testament, properly proven and executed, the use of said property to whomsoever she may see fit;" and with power also to Mary Pearson to appoint another trustee in case of a vacancy, the trustee so appointed taking under and subject to the trusts limited in the deed. The original trustee died in 1890. Mary Pearson in 1899 conveyed all her right, title, and interest in the property described in the trust deed to the remaindermen, who were of full age. Subsequently, in 1904, Mary Pearson nominated C. T. Talbert as trustee to succeed Doris, and empowered him to exercise the power of sale conferred on the original trustee; and the new trustee, under the power of sale, sold and conveyed the land to The Planters Loan and Savings Bank. *Held*: (1) The power of appointment by the life-tenant of the whole estate by will was extinguished by the alienation by the life-tenant of her title in the land to the remaindermen. (2) The power of sale given to the trustee upon the written power of the life-tenant was extinguished by the union of the estate for life with the remainder in fee. (3) The deed from Talbert, trustee, conveyed no title to the bank.

Argued April 19,—Decided May 13, 1905.

Petition for injunction. Before Judge Hammond. Richmond superior court. March 23, 1905.

On February 10, 1905, J. Mumford Rosier presented for sanction, to the judge of the superior court of Richmond county, an equitable petition in which the following facts were recited: In the month of January, 1874, Samuel Pearson conveyed to Patrick Doris, as trustee, his successors and assigns, the fee-simple title to certain property, including a designated tract of land lying in Richmond county, to be held in trust "for the sole and separate use of" the wife of the grantor, Mary Pearson, "for and during her natural life, and after her death to such child or children by [the grantor] as she may leave surviving her at her death, share and share alike; with power to the said Mary Pearson to empower the said Doris, or his successors in the trust, by writing under her hand, to sell any part or the whole of said trust estate and to reinvest the proceeds in such other property, subject to the above-described trusts, as he or his successor or successors may deem most to the interest of said trust estate, without the aid or intervention of any court whatever being necessary. And with power also to the said Mary Pearson, if she shall die leaving no

child or children by [the grantor] living at the time of her death, to limit and appoint by her written will and testament, properly proven and executed, the use of said property to whomsoever she may see fit; and with power also to the said Mary Pearson, by her own writing under her own hand and seal, to appoint and choose another trustee instead of the said Doris, shall he wish to resign said trust or shall die leaving the same unfulfilled or shall remove out of the limits of this State, said trustee so appointed taking under and subject to the trusts herein limited, without, in such new appointment, invoking or needing any aid or intervention of any court of this State." The trustee, Patrick Doris, died in the year 1890, leaving Mary Pearson in possession of the property. After his death, and while the office of trustee was vacant, she and her children, all of whom were of age, executed a conveyance which contained the following recitals: "Whereas Mary Pearson, of said county, has a life-estate with remainder to her children in the real estate hereinafter described [being the tract of land above mentioned], and is desirous of conveying her life-estate in the same to them, . . . they being her only children, and all of said county; and whereas the said children wish to divide the said property as nearly equally as possible among themselves: now, therefore, this indenture made this eighth day of November, eighteen hundred and ninety-nine, between the parties, witnesses: that the said Mary Pearson, for and in consideration of the natural love and affection she bears to her said children, and for and in consideration of one dollar by them to her, the receipt of which is hereby acknowledged, at and before the sealing of these presents, has given, granted, bargained, sold, and conveyed, and by these presents does give, grant, bargain, sell, and convey unto them, the said James W. Pearson, Francis E. Talbert, and Horace C. Pearson, all her right, title, and interest in and to" said tract of land. Subsequently one of these children, Francis E. Talbert, on November 15, 1901, conveyed to John D. Sheahan the portion of the land she acquired under this deed, for the purpose of securing a loan made to her, which conveyance contained a power to sell the land therein described, in the event she made default in paying any of the notes evidencing the loan. On January 6 of the following year John D. Sheahan entered a transfer on the back of this conveyance, reciting that he thereby assigned all his

interest in the security deed, and the notes to secure which it was given, to Horace P. Nichols. Thereafter, on November 1, 1904, Mary Pearson, pursuant to the power in the trust deed, appointed Clarence T. Talbert to fill the office of trustee, made vacant by the death of Doris. On the same date Talbert, as trustee, and Mary Pearson, executed a conveyance to The Planters Loan and Savings Bank, covering the tract of land described in the trust deed, reciting in this conveyance that they were exercising the powers conferred upon them by the deed of trust. The sale of the land by the trustee was really made to plaintiff, the deed being made to the bank to secure it for money advanced to plaintiff with which to make the purchase, and actual possession of the land being surrendered to plaintiff by the trustee and Mary Pearson. The bank, at the time of the sale, required it to be ratified and confirmed by Francis E. Talbert, who conveyed whatever interest she had in the land to the bank. On February 10, 1905, the bank conveyed the land to the plaintiff, who on that date became the absolute owner of it, as against the bank. The plaintiff in his petition alleged that by virtue of his purchase from the trustee he acquired title to the land; he denied that Nichols acquired any title to the land under the transfer indorsed by Sheahan on the back of the security deed to him from Francis E. Talbert, and asked that Nichols and his attorney at law, Frank W. Capers Jr., be enjoined from attempting to sell the land, as they had advertised it was their intention to do, under the power of sale contained in the security deed. The plaintiff further prayed that Nichols be required to appear in court and litigate with him as to who has the legal title to the property, and as to the validity of the power of sale which Nichols was undertaking to exercise. The judge sanctioned the plaintiff's petition and granted a temporary restraining order. On the interlocutory hearing for an injunction no evidence was offered, but the case was tried on the petition and a general demurrer interposed thereto by the defendants. The court, after hearing argument, held that the plaintiff had no title as against Nichols, and refused to grant an injunction. To this judgment exception is taken.

W. K. Miller, for plaintiff. *F. W. Capers*, for defendant.

EVANS, J. (After stating the facts.) The deed from Samuel Pearson to Patrick Doris, trustee, created a trust estate for the

life-tenant, which became immediately executed upon the delivery of the deed, and a legal estate in the remainder to the surviving children of the life-tenant. *Tillman v. Banks*, 116 Ga. 250; *Stiles v. Cummings*, 122 Ga. 635. The life-tenant was given the power of disposition by will in the event only there should be no child or children of the life-tenant, begotten by the grantor, in life at the death of the life-tenant. The life-estate was not changed by this power of appointment by will in the specified event, but it still remained an estate for life, with power to devise by will in a certain contingency. No estate was conveyed to the trustee, but the deed did vest in the trustee a power to sell the entire property conveyed, upon the conditions annexed to the power. A power of sale may lawfully reside in one who has no legal or equitable interest in the property which is to be the subject-matter of the sale. *Coleman v. Cabaniss*, 121 Ga. 281, and cit. Such a power is *simply collateral*, and the person to whom the power is given has no interest in the land; neither is any estate given to him. 4 Kent's Com. *317. By this deed Doris was only the trustee of a power of sale exercisable by compliance with the prescribed terms. *Heath v. Miller*, 117 Ga. 857, and cit.

Having construed the deed, it now becomes necessary to discuss whether, under the facts alleged in the petition, the power of sale had been extinguished when Talbert, trustee (who was the successor to Doris, trustee), attempted to exercise it by the conveyance to The Planters Loan and Savings Bank. Mrs. Pearson, the life-tenant, on the arrival at majority of her children, conveyed to them "all her right, title, and interest" in and to the land described in the trust deed. By the same conveyance the land was partitioned between the remaindermen. The deed from Mrs. Pearson to her children divested her of the power of appointment of the estate by will in case the remaindermen died before she did. The life-tenant's power of appointment of the estate by will was a power *in gross*. The alienation of the life-estate by the life-tenant extinguished this power (4 Kent Com. *346), and the remaindermen were vested with the whole title. When the remaindermen became clothed with the life-estate, the merger of estates was complete, and they became the owners of the entire estate in fee simple. The power of sale given to the trustee could not be exercised after the union of the estate for life with the

remainder in fee. *Wolley v. Jenkins*, 23 Beav. 53. By parting with her life-estate Mrs. Pearson not only lost the power of disposition of the property by will, in the happening of the contingency named in the deed, but she also lost the power to authorize the trustee to sell the trust estate for reinvestment.

Aside from the technical rules of construction, a deed should be construed to effectuate the grantor's intention as expressed in the instrument. It is not conceivable that the grantor intended that his wife should affect to sell the land after she had parted with all title therein. There are no words in the conveyance restraining alienation by the wife of the estate granted to her. She was an adult when the deed was executed, and no trust could be created for her benefit. Her estate was a legal estate, with no inhibition against her disposing of the same according to her own free will. Courts must determine the legal effect of a conveyance, and the intention of the grantor must be taken in harmony with, and not in contravention of, the rules of law. Perhaps the grantor may not have contemplated a conveyance by the wife or her life-estate. Be it so, the clear import of the whole instrument was that the power of sale was to be exercised for the benefit of the wife with respect to her interest in the property, and the disposition of her interest destroyed the grantor's intent and extinguished the power.

We therefore hold that the effect of the deed from the life-tenant to the remaindermen was to extinguish the power of sale of the trustee as expressed in the trust deed, and consequently no title passed to the bank by virtue of the deed from Talbert, trustee, to The Planters Loan and Savings Bank. The bank having no title to convey, its grantee, Rosier, had none; and it is of no concern to him whether or not the defendant was acting within the scope of his legal rights in advertising for sale under a power a part of the land which had been conveyed by one of the remaindermen to secure a loan of money. There was no error in refusing the injunction.

Judgment affirmed. All the Justices concur, except Candler J., absent.

ELLIOTT v. McCALLA, executrix.

FISH, P. J. This case is controlled by the well-established rule, that, where the verdict was not demanded under the law and the evidence, the grant of a first new trial will not be disturbed, though based on a single ground, and without regard to whether or not such ground was meritorious. *Macon Consolidated St. R. Co. v. Jones*, 116 Ga. 351, and cases cited; *Cordray v. Savannah Ry. Co.*, 117 Ga. 464; *Mock v. Savannah Ry. Co.*, 122 Ga. 385. Judgment affirmed. All the Justices concur, except Candler, J., absent.

Submitted April 14,—Decided May 13, 1905.

Complaint. Before Judge Proffitt. City court of Elberton. January 25, 1905.

Z. B. Rogers and *Van Duzer & Tutt*, for plaintiff.
Joseph N. Worley, for defendant.

NEAL v. SMITH.

Where a portion of a crop owned by a tenant at the time of his death was set apart to his widow as a year's support, she could recover the same in trover from one to whom the landlord, without any authority, had delivered it as payment on a debt which the deceased owed such person, although the tenant owed the landlord one fourth of the crop for rent and such conversion was made before the year's support was set apart.

Submitted April 14,—Decided May 13, 1905.

Trover. Before Judge Stark. City court of Jefferson. January 31, 1905.

J. S. Ayers, for plaintiff.

FISH, P. J. Lucy Neal brought trover and bail against J. N. Smith for a certain bale of cotton and thirty bushels of cottonseed. The case was tried before the judge of the city court without a jury, who rendered judgment in favor of the defendant. Plaintiff moved for a new trial on the general grounds, which being refused, she excepted. It appeared on the trial that Gus Neal, the husband of Lucy Neal, died January 15, 1903, owning the property in question. He owed his father, Floyd Neal, one fourth of this cotton and seed, for rent of the land upon which they were grown. He also owed Green & Smith a debt secured by mortgage on this property. Soon after his death, Smith, the defendant, en-

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deavored to induce Lucy Neal to let him have this bale of cotton and the seed as a payment on the debt Gus owed Green & Smith, but she declined to do so, telling him that she needed it "to live on." Smith had Floyd Neal to see Lucy and to use his influence with her to obtain her consent for the cotton and seed to be applied to the debt due Green & Smith, but she still refused. During the illness of Gus, Floyd had hauled the cotton to the gin. After Gus's death and after Smith had failed to get Lucy to consent for him to take the cotton on the debt due his firm, Green, his partner, had the mortgage foreclosed. The mortgage *fi. fa.* was levied on the bale of cotton and on the seed belonging to Gus Neal's estate, and also on a bale of cotton belonging to Floyd Neal. Smith refused to dismiss the levy as to Floyd's cotton, unless he would haul the bale belonging to Gus's estate from the gin, where the levying constable had left it, and deliver it to Smith. Floyd finally consented to do this, and carried out the agreement, and the levy upon the property was dismissed. Smith took the cotton belonging to Gus Neal's estate at a price agreed upon between him and Floyd Neal, paid Floyd the amount due him by Gus for rent, and credited the balance on the debt Smith & Green held against Gus's estate. Smith endeavored to get Floyd to bring him the seed from this cotton, but Floyd refused to do it. Smith then saw a Mr. Carson, who claimed to have a bill of sale to the seed, and purchased the seed from him. No such bill of sale was put in evidence. After all this had occurred, and on January 31, 1903, the bale of cotton and the seed in question were set apart to Lucy Neal as a year's support. She demanded them from Smith before suit, and he refused to deliver them to her. Their value was proved. Plaintiff asked for a judgment for the highest proved value of the cotton and seed, under the facts above set forth, about which there was no controversy. The judge should have rendered such a judgment in the plaintiff's behalf. In refusing a new trial, the judge gave as his reason therefor, that Floyd Neal, who was Gus Neal's landlord, owned part of the cotton and seed and that he sold the same to defendant before they had been set apart as a year's support to plaintiff. The mere fact that a tenant agrees to pay his landlord as rent one fourth of the cotton grown on the land rented does not make the landlord owner of one fourth of such

cotton. In such a case the title to all of the cotton is in the tenant; it is otherwise, however, when the landlord, by express contract, reserves title in the crops to be grown on the rented land. *Riddle v. Hodge*, 83 Ga. 173. The mere fact that the landlord has a special lien on the crop for his rent does not put title to the crop in him, and he can not acquire title thereto by simply taking possession of the same. See, in this connection, *Hall v. McGaughey*, 14 Ga. 405, and cit. And while a year's support can not be set apart to the widow of a tenant out of crops grown on rented land, as against the landlord's lien for rent (Acts 1899, p. 47), the landlord has no title to such crop, nor can he acquire title to it by merely taking possession of the same. Therefore, in the present case, Floyd Neal, who was landlord of plaintiff's deceased husband, had no title to the bale of cotton and the cottonseed which he took possession of and delivered to the defendant. The plaintiff, however, did not contend for the value of all of the cotton and seed, but only for the value of three fourths of it. In other words, she was willing for the defendant to retain the fourth of it which her husband owed Floyd Neal for rent. After Gus Neal's death the cotton and seed in question constituted a portion of his estate, and the title to the same was not divested by the sale of it made by Floyd Neal to Smith. When the property was set apart to Lucy Neal as a year's support, the title vested in her, and she had the right to recover it, or its value, from Smith, who had converted it.

Judgment reversed. All the Justices concur, except Candler, J., absent.

WESTERN AND ATLANTIC RAILROAD COMPANY v. BURNHAM, executrix.

1. Where in an action against a railway company for personal injuries the plaintiff seeks to recover on the theory that the employees of the defendant "forcibly and violently removed her from a moving train, in reckless, if not wanton, disregard of her rights and safety," a new cause of action is not added by an amendment which alleges in effect that the plaintiff voluntarily alighted from the moving train with the assistance of the defendant's employees, and that on account of the fact that the train was moving and by reason of the manner in which she was assisted to alight she sustained injury to her person.

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2. While in the trial of an action of the nature above indicated evidence that the plaintiff complained of specified pains and injuries is not ordinarily admissible, it will not, in a given case, be cause for a new trial that evidence was admitted that the plaintiff merely *complained*, and stated that she had received a jolt in alighting from the train.
3. The instructions of the court on the subjects of contributory negligence, the degree of diligence required of the defendant, and the duty of the plaintiff as to avoiding the consequences of the defendant's negligence were not so confused and connected with each other as to be misleading.
4. When all of the instructions on the subject of the measure of damages are considered together, there was no material error in the charge on that subject.
5. The charge that it was the duty of the defendant to stop the train "long enough" at its station for the plaintiff to alight was not erroneous because an expression of opinion as to what would be negligence, but was a correct statement of a rule of law applicable to one of the issues in the case. It was inaccurate to charge that the defendant should have furnished the plaintiff a safe place to alight, because there was no allegation in the petition to warrant such an instruction; but this inaccuracy is not cause for a new trial in this case.
6. The evidence warranted the verdict, and there was no abuse of discretion in refusing to set it aside.

Argued April 15, — Decided May 13, 1905.

Action for damages. Before Judge Fite. Gordon superior court. October 29, 1904.

When this case was before this court at the October term, 1902, it was held that the petition, properly construed, sought to recover on the theory that the defendant's employees, against the plaintiff's will, "forcibly and violently removed her from a moving train, in reckless, if not wanton, disregard of her rights and her safety;" and that as there was no evidence to support this theory, a verdict in favor of the plaintiff was not authorized. 116 Ga. 448. At the second trial the plaintiff offered an amendment, in which she alleged, that she was not discharged from the car in the manner that she should have been, or with the care and caution that the defendant's employees should have exercised; that when, with her baby in her arms, she got upon the bottom step of the platform with a view of getting off the train, it began to move; that the conductor and flagman negligently omitted to order the train stopped, and while it was in motion took the plaintiff by the arms and discharged her from the car, and, though supported by them, she struck the ground more violently than under other conditions might have happened; that as a result of

the negligence of the defendant in not stopping the train for the purpose of discharging the plaintiff and "in lifting or assisting her off while the car was yet in motion," she was injured and damaged. The defendant objected to the allowance of the amendment, on the ground, among others, that it set forth a new cause of action. The court allowed the amendment. The trial resulted in a verdict against the defendant, for \$600. It excepted to the allowance of the amendment, and to the overruling of its motion for a new trial.

Payne & Tye and Starr & Erwin, for plaintiff in error.

W. R. Rankin and Cantrell & Ramsaur, contra.

FISH, P. J. 1. Counsel for the plaintiff in error contend that the amendment, properly construed, made no material change in the original petition; but that if it can be construed to vary materially from the petition in the allegations as to the manner in which the injury was sustained and the negligence of the defendant, it set forth a new cause of action, and for this reason should not have been allowed. There were other grounds of objection, but they were not referred to in the brief of counsel for the plaintiff in error. The original petition, as construed by this court, charged that the plaintiff was forcibly and against her will removed from the car, whereas the amendment avers, not that the plaintiff was forcibly removed from the car, but that she was assisted to alight under such circumstances and conditions as to result in injury to her person. We think it clear that the amendment differs from the original petition in material particulars as to the details of the transaction which resulted in the plaintiff's injury. The amendment did not set forth a new cause of action. This subject was so exhaustively, ably, and thoroughly discussed by the Chief Justice, in *City of Columbus v. Anglin*, 120 Ga. 785, 790 et seq., that it would be a work of supererogation to attempt to throw any additional light on the abstract question there discussed. The key to the whole matter lies in the proposition there announced (p. 791), that "so long as a plaintiff pleads but one wrong, he does not set up more than one cause of action." See also *Insurance Co. v. Leader*, 121 Ga. 260 (2), 268; *So. Ry. Co. v. Horine*, 121 Ga. 386 (1); *Cen. of Ga. Ry. Co. v. Henson*, 121 Ga. 462. Tested by the rules laid down in these cases, we have no

difficulty in reaching the conclusion that the amendment did not set forth a new cause of action. The cause of action was the same as that declared on in the original petition, to wit, the wrong done the plaintiff by negligently injuring her in the manner in which she alighted from the train. Or, to state it differently, the plaintiff had a right to disembark safely from the train. The wrong consisted in violating this right. The manner in which it was violated was a minor fact and might be changed by amendment. New charges of negligence could be thus added if they contributed to or related to the same wrong. *So. Ry. Co. v. Horine*, supra. The amendment sought merely to change the description of the details or minor facts of the transaction. It did not change the main fact. The wrong in each case was the same. A plaintiff may in different counts of a petition set forth the same cause of action in as many different ways as he sees proper. *Gainesville Ry. Co. v. Austin*, 122 Ga. 823. Whether he can do so in the same count is, however, a question of some difficulty, and one which need not be decided in the present case. Nor need we decide whether the amendment in the present case should be treated as adding a new count to the petition, or as making contradictory averments of fact in the same count, none of the allegations of the original petition having been stricken. The objection to the amendment raised no such question, but alleged merely that the amendment set forth a new and distinct cause of action. This objection was not well taken.

2. In one ground of the motion for a new trial error is assigned upon the admission of testimony that the plaintiff "complained" the night after the injury, and just as she got off the train said "that was quite a jolt, or something to that effect." In *A. & N. Ry. Co. v. Gardner*, 122 Ga. 82, it was held to be error, in the trial of an action for personal injuries, to admit testimony that the plaintiff complained to her physician "of back-ache and pains in her hips." In the present case, however, it does not appear that the plaintiff complained of any particular pain or injury, but that she simply *complained* and stated that she had received quite a jolt. We are unable to see how this testimony could have prejudiced the defendant in any way or have resulted in any harm to its case. The admission of the testimony was not cause for a new trial.

3. Complaint is also made that the court charged in the same connection the principles of law laid down in the Civil Code, §§ 2322, 3830; and it is contended that, under the ruling in *Americus Ry. v. Luckie*, 87 Ga. 6, which was followed in *Macon Ry. Co. v. Moore*, 99 Ga. 229, and in *Savannah Ry. Co. v. Hatcher*, 118 Ga. 273, a new trial should have been granted. In the charge complained of, the judge instructed the jury that, the plaintiff being a passenger, the defendant was bound to exercise extraordinary care. He then defined this degree of diligence, and stated that if the defendant failed to exercise it the plaintiff could recover, if she could not, by the exercise of ordinary care, have prevented the injury. The judge then charged the law relating to contributory negligence, prefixing the instruction and separating it from the other charges by the word "again." The law was correctly given on all the subjects dealt with, and we do not think the different principles were so confused and connected with each other as to be misleading. The case differs from those cited and relied on by the plaintiff in error.

4. Complaint is also made of the charge on the subject of the measure of damages, wherein the court instructed the jury that the plaintiff could recover for the "actual injury sustained by her." It is claimed that the language quoted is too broad. When this language is read in connection with the other portion of the charge, it is perfectly plain that the court intended to restrict the plaintiff to a recovery of damages for pain and suffering arising from the injuries alleged in the petition and supported by testimony. The jury were distinctly instructed that, as the plaintiff was a married woman, no recovery could be had for lost time, diminished capacity to labor, or expenses of medical attention. The only measure of damages for pain and suffering is the enlightened conscience of an impartial jury; and this the court charged.

5. The court charged that it was the duty of the defendant to stop its train long enough for the plaintiff to alight, and to furnish her a reasonably safe place to get off. It is contended that this is an expression of opinion as to what would constitute negligence, and that there was no allegation in the petition that the defendant had not furnished a safe place for the plaintiff to alight from the train. We do not think the charge contained any expression of opinion which would violate the rule laid down in the code, that

a judge must not express or intimate any opinion as to what has or has not been proved. The judge was merely stating to the jury the rule of law applicable to one of the issues in the case. It is certainly good law that a carrier of passengers must stop its train at stations a reasonable time for passengers to alight. The expression "stop long enough" for the plaintiff to alight was not strictly accurate, but no criticism was made on this language. The judge was not dealing with a question of negligence, but was strictly within his province in charging the jury the rules of law by which they were to be governed. It was, however, inaccurate to refer, in the charge, to a safe place at which to alight. There was no allegation in the petition rendering such an instruction pertinent, and it should not have been given. But we do not think this inaccuracy would require the granting of a new trial. This is the second verdict in the case, and one reasonable in amount. The case was fairly tried, and this slight inaccuracy ought not to work a new trial.

6. There was evidence which supported the allegations in the amendment to the petition, and the verdict was therefore not without evidence to support it.

Judgment affirmed. All the Justices concur, except Candler J., absent.

CATOOSA SPRINGS COMPANY v. WEBB.

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There was nothing in the evidence to authorize a submission to the jury of the question whether the line between the two estates had been acquiesced in for seven years, as shown by acts or declarations of the adjoining landowners.

Argued April 15, — Decided May 13, 1905.

Processioning. Before Judge Fite. Catoosa superior court. October 17, 1904.

Payne & Payne and R. J. & J. McCamy, for plaintiff in error.
W. E. Mann, contra.

COBB, J. Webb was the owner of lot 198 and the Catoosa Springs Company was the owner of lot 197 in the 28th district of Catoosa county. The dividing line between these lots was in controversy. Processioners were appointed to mark the line, and the

company filed a protest to their return. The issue thus made up came on for trial in the superior court, and resulted in a verdict in favor of the line as marked by the processioners and as contended for by Webb. The evidence abundantly authorized, if it did not demand, a finding that the original survey called for the line as contended for by the company. Webb contended that even if the line as claimed by him was not according to the original survey, acquiescence for seven years, by acts and declarations of the present owners of the lots and those under whom each claimed, had established the line as marked by the processioners. The judge submitted this question of acquiescence to the jury, and this is assigned as error, and is the controlling question in the case as here presented. To establish a line by acquiescence, it must appear that the owners of the property to be affected by the establishment of the line either acted in such a manner for a space of seven years, or made such declarations during the continuance of that period, as to show that the line claimed was the true line between the estates. While there is in the record evidence of a recognition of the line as claimed, there is not sufficient evidence to authorize a finding either that the owners agreed upon this line, or that this recognition continued for such a length of time as to amount to an acquiescence for seven years. There are witnesses who testify that the adjacent landowners acquiesced in this line, but upon a close analysis of their testimony it appears that this was really nothing more than mere neighborhood notoriety and not based upon any specific acts or declarations. A careful scrutiny of the entire evidence fails to disclose either an act or a declaration which could be made the foundation for a finding that there had been an acquiescence for seven years in the line claimed. The case should have been submitted to the jury simply on the issue as to whether the evidence was sufficient to show that the line as marked by the processioners was the line of the original survey; and it was erroneous, under the present evidence, to charge upon the subject of acquiescence for seven years by acts or declarations.

Judgment reversed. All the Justices concur, except Candler, J., absent.

CROWN COTTON MILLS *v.* McNALLY.

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1. If there are latent defects in machinery, or dangers incident to an employment, unknown to a servant, of which the master knows or ought to know, he is bound to give the servant warning in respect thereto.
2. In a suit by a servant against a master, alleging failure of duty on the part of the latter in not giving to the servant warning of a danger incident to his employment, it must appear that the master knew or ought to have known of the danger, and that the servant injured did not know and had not equal means with the master of knowing such fact, and by the exercise of ordinary care could not have known it.
3. If the danger is obvious, and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it.
4. A master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency. If he discharges his duty in these particulars, he is not required to anticipate that they may be negligent, and to warn one of them of dangers which may arise from the possible negligence of others.
5. Where an employee injured by a machine in a cotton factory contended that the danger was not obvious, because a portion of the machine was covered with cotton which obscured the view and prevented the employee from seeing an open door in the machine; and where the defendant sought to show that had the plaintiff performed his duty the cotton would not have fallen down so as to obscure the view and prevent the open door from being readily seen, it was error for the presiding judge to charge that it was immaterial whether the cotton fell down so as to obscure the view or not.
6. The charge in respect to the measure of damages was somewhat general, but the evidence not disclosing elements of special damage of a kind to require more detailed instructions on the subject, and there being no request to charge, the judgment would not be reversed on this ground.

Argued April 20, — Decided May 13, 1905.

Action for damages. Before Judge Fite. Whitfield superior court. November 14, 1904.

McNally brought suit against the Crown Cotton Mills, a corporation, seeking to recover damages for a personal injury. He alleged that he was an employee of the defendant, and was working on a certain machine; that it had rollers, teeth, and saws which were protected by an apron or door, which for the safety of the employee should be, and usually was, kept closed, and so far as plaintiff knew had always been so kept while the machine was running; that to have left the door down or open so as to expose the cylinders and saws was dangerous to the person operating the machine; that the plaintiff was young (being but sixteen years old) and inexperienced, especially in regard to this machine, and

had not been warned of its dangers, or of the danger incident to leaving the door open or down, or as to the absence of the "stripper stick;" that he was put to work upon the machine, and it was his duty to clean off the "stripper stick;" that he was proceeding to find it for that purpose; that the defendant had negligently left the machine in a dangerous condition; that the stick was not present, and the door was negligently left down, and the machinery was open so as to catch the hand of a person working there; that he was not aware of this, nor, in the exercise of ordinary care, could he have discovered it, because the whole top and breast of the machine were filled with cotton and covered completely, and it was not possible to tell whether the door was closed or whether the stick was present, or what condition the machine was in; that the foreman was present and knew of this, but did not notify him of the danger; and that while hunting for the stick his hand was injured. Negligence was charged in not furnishing him a safe place to work, and in not warning him of the danger; and there were other allegations not material to mention. The defendant denied negligence or liability on its part. After a verdict for the plaintiff the defendant moved for a new trial on several grounds. The following charges, among others, were alleged as error: "If the injury occurred on account of the negligence of the defendant company in not notifying the plaintiff, as he insists, and he did not know of the dangerous condition of the door when down, or could not have known it by the exercise of ordinary care and diligence, then he could recover." "The real question for you to determine first, I will say, is whether or not defendant, in the exercise of ordinary care, should have notified the plaintiff of the dangerous condition of the machinery when in motion and the door down." "There is some contention as to whether the cotton did or did not fall down over the open door so as to obscure the vision and prevent the plaintiff from seeing whether or not it was dangerous, but as the court understands the law and gives you in charge, it is immaterial whether it so fell down or not. The question is, in this case, did the plaintiff know of the danger incident to operating the machinery when the door was open? If he did, or ought to have known it by the exercise of ordinary care and diligence, then he can not recover. If he did not or could not, then he can recover." Error was further assigned on the charge as to

the measure of damages, on the ground that it was too vague and indefinite, and laid down no rule for the jury in arriving at the amount of the verdict, but allowed them to give an amount that in their judgment would compensate the plaintiff for the loss of his arm. It is unnecessary to set out the evidence further than to state that the plaintiff sought to sustain his allegations, while the defendant sought to show that it was not negligent, but that the injury to the plaintiff resulted from his own negligence or that of his coemployees. He was sixteen years of age, and had worked at the mill several years and at this machine about three weeks. The doors were opened and the cards cleaned several times a day. The motion was overruled, and the defendant excepted.

R. J. & J. McCamy, for plaintiff in error, cited, besides the authorities cited in the following opinion, Civil Code, § 3830; *Ga. R.* 80/227; 94/535; 95/815; 111/528.

Arnold & Arnold, Harvey Hill, and George G. Glenn, contra, cited *Ga. R.* 60/329; 76/785; 80/637; 86/149-50; 92/95; 118 U. S. 554; 2 Thomp. Tr. §§ 2077-78; Poll. Torts, *161-2; Field, Dam. 613-15; Wood's Mayne, Dam. 596, § 627; 4 Q. B. Div. 406, 49 L. J., Q. B. 237-8.

LUMPKIN, J. (After stating the facts.) 1-3. If there are latent defects in machinery, or dangers incident to an employment, unknown to a servant, of which the master knows or ought to know, he is bound to give the servant warning in respect thereto. But a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In a suit seeking to recover of a master, where it is claimed that there was a failure of duty on his part in not giving to the servant notice or warning of a danger incident to his employment in connection with a machine, it must appear that the master knew or ought to have known of the danger in the machinery, and that the servant injured did not know and had not equal means with the master of knowing such fact, and by the exercise of ordinary care could not have known of it. Civil Code, §§ 2611, 2612. If the danger is obvious, and as easily known to the servant as to the master, the latter will not be liable for failing to warn him of it. *Ludd v. Wilkins*, 118 *Ga.* 525; *Hamby v. Union Paper-Mills Co.*, 110 *Ga.* 1; *Stubbs v. Atlanta Oil Mills*, 92 *Ga.* 495; *Cartledge*

v. *Pierpont Mfg. Co.*, 120 Ga. 221; *Hoyle v. Excelsior Laundry Co.*, 95 Ga. 34; *White v. Kennon*, 83 Ga. 343.

4. As to fellow-servants, the duty of the master is to exercise ordinary care in the selection of them, and not to retain them after knowledge of incompetency. If he discharges his duty in this regard (except in cases of railroads, or of children of tender years), he is not liable to one servant for injuries arising from the negligence of fellow-servants. One of the risks which a servant assumes is negligence or misconduct of a fellow-servant about the same business. Civil Code, § 2610; *Evans v. Josephine Mills*, 119 Ga. 448; *Shields v. Yonge*, 15 Ga. 349. If the master has used ordinary care in the selection of servants, and has not retained them after knowledge of incompetency, he is not required to anticipate that they may be negligent, and to warn one of them of dangers which may arise from the possible negligence of others. While the presiding judge charged that if the injury occurred on account of the negligence of fellow-servants, "nothing else appearing," the plaintiff could not recover, he immediately followed this charge with the first and second charges complained of, as set out in the statement of facts. As he did not inform them that the master was not bound to anticipate negligence of a coemployee and give warning against it, and as one contention in the case was whether the danger was such as to impose on the master the duty to give warning in regard to it, or was a danger arising solely from negligence of a coemployee, these charges, standing alone, did not fully submit to the jury how far the duty of the master in this respect extended. As no request to charge on the subject was made, perhaps a new trial might not result on this ground alone.

5. The plaintiff alleged, and sought to prove, that the danger was not obvious, because the top and breast of the machine were covered with cotton, and it was not possible to tell whether the door was closed or open. The defendant sought to show, that it was the duty of the plaintiff to look after what is called the "stripper stick" on which the cotton was wound, and to clean it off and put it back; that if this had been properly done, the cotton would not have fallen down and obscured the complete view of the open door; that instead of doing this himself, he asked another employee to do it, on the occasion in question; and that if it were not done, and the cotton fell so as to wholly or partially

conceal the open door, it resulted from the plaintiff's own fault, or that of his coemployee, and not from any latent danger in the machine itself, whether the doors were open or shut. It will thus be seen that the question of whether the danger was obvious and patent, or, if not, whether it was prevented from being so by reason of the plaintiff's own conduct or that of a fellow-servant, was an important one. It was accordingly error for the court to inform the jury that, in the view which he entertained of the law, it was immaterial whether the cotton fell down so as to obscure the vision, or not. Counsel for the plaintiff contends that the charge which the court gave on this subject was more injurious to him than to the defendant. But it was erroneous, and may have shut out from the jury a material contention forming part of the defense.

6. The charge in respect to the measure of damages was somewhat general, informing the jury that they should only compensate the plaintiff, if they found for him, for the loss of his arm and for pain and suffering, and that they should determine how much would be a fair and just compensation. There was, however, no evidence showing diminished earnings. Neither were the mortality tables introduced. The data on which to base the charge on this subject being not very exactly proved, it was natural that the charge on it should be general. No more specific charge was requested.

Judgment reversed. All the Justices concur, except Candler J., absent.

SMILEY v. PADGETT.

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1. In the trial of a claim case, declarations of the defendant in execution, made up to the time of the levy and while he was in possession, that he owned the property levied on, are admissible in evidence, if there is any evidence that he was in possession of the property at the time of the levy; but if the evidence on the question of possession is conflicting, the jury should be instructed to disregard the declarations unless they believe that the defendant was in possession. In the absence of an exception to the charge, it is to be presumed that the jury were so instructed.
2. The evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

Submitted April 20,—Decided May 13, 1905.

Levy and claim. Before Judge Fite. Gordon superior court.
December 12, 1904.

An execution, issued on the foreclosure of a laborer's lien in favor of Padgett, was levied on a lot of wood as the property of Huffaker, and Smiley interposed a claim. The jury found the property subject. The claimant's motion for a new trial was overruled, and he excepted. The motion was on the grounds, that the verdict was contrary to the evidence, and that the court admitted evidence that the defendant in execution had stated, before the levy, that the wood was his.

Cantrell & Ramsaur and R. J. & J. McCamy, for plaintiff in error. Starr & Erwin, contra.

COBB, J. 1. In *Rutledge v. Hudson*, 80 Ga. 267 (6), it was held that where the claimant admitted that the defendant in execution was in possession at the time of the levy, any declarations made by the defendant up to the time of the levy and while in possession are admissible in evidence. The principle of this decision would extend to a case where the evidence showed that the defendant was in possession. Whenever there is evidence of possession in the defendant in execution at the time of the levy, his declarations may be admitted. In such a case, however, the jury should be instructed to disregard the declarations unless they believe from the evidence that he was in possession claiming the property as his own. In the present case there was no exception to the charge, and we are bound to presume that the jury were correctly and fully instructed on this question; and there was evidence from which the jury could find that the defendant in execution was in possession claiming the property as his own.

2. While the evidence was conflicting, and probably preponderated in favor of the claimant, there was evidence from which the jury could find that the defendant in execution was the owner of the wood. The claimant's theory was that Huffaker was employed by him to haul and ship the wood, and that he had been fully paid for his services. If the jury had believed the claimant's theory, they would have been bound to find from the evidence that Huffaker had been fully paid for his services. But the jury were authorized to find that Huffaker owned the wood levied on, and that the property was subject to the execution.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

CHATTANOOGA SOUTHERN RAILROAD COMPANY v.
WHEELER, administrator.

A railway company is not, relatively to one who has no business to transact with it but who goes to its station at the instance of a third person to look after some private property which he has, without the company's permission, stored in a warehouse which it has practically abandoned and allowed to become out of repair, under any duty to keep the building and its approaches in a safe condition for use by persons entering or leaving the same.

Argued April 20, — Decided May 13, 1905.

Action for damages. Before Judge Henry. Chattooga superior court. August 31, 1904.

J. M. Bellah and Pritchard & Sizer, for plaintiff in error.

Wesley Shropshire, contra.

EVANS, J. A suit for damages was brought by W. T. Simmons against the Chattanooga Southern Railroad Company, the plaintiff alleging that he had sustained personal injuries by reason of having fallen through a platform built around a station-house belonging to the defendant company, which platform the company had failed to keep in repair or in a safe condition for use by the public. Pending the action the plaintiff died, and his administrator, J. V. Wheeler, was made a party plaintiff in his stead. The case was three times tried, the last trial resulting in a verdict against the railroad company. It is here complaining of a judgment overruling its motion for a new trial, and also of the refusal of the court to grant a nonsuit. The plaintiff based his right to a recovery upon the following allegations of fact: At Chelsea the defendant company had a depot and warehouse, wherein goods were stored whilst awaiting shipment from that station, or delivery after shipment to its patrons. It maintained a platform attached to the building, over which ingress to and egress from the building was had by members of the public who had business to transact with the company. On or about May 8, 1900, plaintiff "was superintending the sale or delivery of guano for one Tom Knox, which had been shipped to said Knox over defendant's said road and stored for delivery in said warehouse." He entered the warehouse, as he had the right and privilege to do, for the purpose of attending to his duties in connection with the delivery of this guano, and also "for the purpose of seeing after some other goods or freight

in said warehouse, in which petitioner was interested." After attending to the matters in hand, he started out of the warehouse and went upon and along the platform; the supports under the platform had become rotten and decayed, the floor suddenly gave way beneath plaintiff, and he received a violent fall and serious injury.

The plaintiff's petition undoubtedly stated a case showing liability on the part of the company. The proof offered in his behalf, however, fell far short of proving his case as laid. The following facts were brought to light: The depot and warehouse at Chelsea had been erected by the company a number of years before Simmons met with his injury, but at that time the company had no agent at that station, and had practically abandoned all use of the building, which had fallen into a dilapidated condition. Patrons of the road still used the platform when they had freight for shipment and the trainmen unloaded freight upon it. Occasionally when the consignee was not at the station to receive freight, or when it was raining, goods were placed inside the warehouse and there left to their fate by the trainmen. Some agricultural implements which had been shipped over the railroad were for some time stored in the warehouse, which was allowed to remain open and uncared for; but whether this was with the knowledge and acquiescence of the company did not appear. One of its patrons stored some guano in the warehouse. Knox inquired of him if he had the company's permission to store it there, and he said he had, and "it would be all right" for Knox to put his in there. Knox had received a car-load of guano at Chelsea, which had been delivered to him on a side-track; part of it he unloaded from the car into the wagons of customers to whom he had sold some; the car was afterwards rolled down to the warehouse by him, the rest of the guano unloaded and placed in the building, and the car then rolled back to the point at which the company had delivered it to him. All this was done without permission from the railroad authorities. Knox afterwards sold the guano from time to time to customers, delivering it to them at the warehouse, and he had employed Simmons to look after the guano and make delivery of it to customers when he (Knox) was not there.

It will thus be seen that, in so far as Simmons figured as the representative of Knox, the plaintiff's case was not made out.

The company owed to neither Knox nor his agent, under the circumstances, any duty to keep in a safe condition the platform built around its abandoned warehouse. Knox does not appear to have been even a licensee; delivery to him of the guano had been made by the company at a point removed from the building, and he subsequently used the warehouse for his private ends, without its permission and presumably without its knowledge. No implied invitation was held out to Simmons or to the public generally to use the premises in carrying on a commercial enterprise wholly disconnected with the business in which the company was engaged, and it can not be held accountable for its failure to keep its building and appurtenances in a state of repair. The evidence also failed to support the allegation in the petition that Simmons went into the warehouse "for the purpose of seeing after some other goods or freight" therein, in which he was personally interested. It appears that he was the owner of a cowhide which he had tried to sell; that it had been left in one of the rooms of the depot without any permission from the company, and that he had gone into this room to see if it was still there, but did not find it. There was no pretense that he had any intention of offering the cowhide to the company for shipment, or had any business dealings with the company in connection therewith. Our conclusion is that the evidence did not support the verdict returned in favor of the plaintiff, and that a new trial should, for this reason, have been granted. Exception is taken to a number of charges by the court, whereby the jury were left to determine whether or not, under the evidence, the company owed to Simmons the duty of keeping its premises in a safe condition. In the view we take of the evidence, the giving of these charges was erroneous, they not being warranted by the undisputed facts of the case.

Judgment reversed. All the Justices concur, except Candler, J., absent.

JANES *et al.* v. DOUGHERTY, administrator.

1. A will with only two witnesses is absolutely void as a muniment of title to realty in this State; and a judgment of probate can not give it any validity.
2. While a party may be estopped, under certain circumstances, from asserting the invalidity of a will, there was nothing in the present case which would

authorize a finding that such an estoppel had arisen in favor of the plaintiffs against the defendant.

3. There was no error in any of the rulings on evidence, which were complained of; and the court did not err in granting a nonsuit.

Argued April 22, — Decided May 13, 1905.

Complaint for land. Before Judge Bartlett. Floyd superior court. November 28, 1904.

The petition alleged, in substance: Ambrose Mills died in North Carolina, and his will, which was executed according to the laws of that State, was duly probated and admitted to record there in 1849. He thereby devised to his daughter, Jane A. King, certain town lots in Rome, Georgia, one of which is the land sued for, to be held by her "during her life, for the use and support of herself and children, and at her death said property . . . to be equally divided among the heirs of her body." She caused a copy of the will to be recorded in the office of the ordinary of Floyd county in 1859, and took possession of the property as devisee for life, claiming no other interest in it. The defendant is in possession of it, claiming that he purchased her life-interest. He had notice of the will when he bought this interest and before he bought any remainder interest in the property. Although the will is attested by only two witnesses, he is estopped to deny its validity as to the remainder interests. Jane A. King died in 1890. Some of the plaintiffs are her children, and the others are children of certain of her children who died in her lifetime. They "claim said lot and rents of the same as devisees under said will, and not as heirs of said Jane A. King." At the trial some of the plaintiffs withdrew from the case. From the evidence introduced by the plaintiffs it appeared, that Ambrose Mills exercised acts of ownership over the lot in question, and that after his death Jane A. King took possession of it and claimed an interest in it under his will. She had eight children, and during her life, at different times between 1871 and 1880, the defendant obtained conveyances of the interests of seven of them. The other died in the lifetime of the mother. Their deeds described these interests as undivided remainder interests, to take effect after the expiration of the life-estate of Jane A. King. In 1880 Jane A. King, by a deed which recited that the remainder interests were in her children, conveyed to the defendant what was described as her "life-

interest, and no more," in the lot in question. None of the deeds referred to the will of Ambrose Mills or indicated how the life-estate and remainder interests were created.

A certified copy of the will of Ambrose Mills and of the probate proceedings in North Carolina, which was offered in evidence by the plaintiffs, was excluded by the court, on objection, on the ground that the will, having only two witnesses, was invalid in this State. The court excluded, as incompetent, the record of the will and of the North Carolina probate proceedings, as made in the office of the ordinary of Floyd county. The plaintiffs offered in evidence certified copies of the inventory and sale bill of the property of William E. Mills, "showing the disposition of the personal property . . . willed him by his father, Ambrose Mills;" also a certified copy of the will of William E. Mills, showing the disposition of lands, in North Carolina, devised to him by his father. On objection these documents were excluded as irrelevant. The court granted a nonsuit. The plaintiffs excepted to each of the rulings stated.

Seaborn & Barry Wright, Dean & Dean, and W. W. Mundy, for plaintiffs. *Alexander & Hillyer,* for defendant.

COBB, J. A will executed in the presence of only two witnesses is inoperative to pass title to land in this State. The will is void as a muniment of title, the judgment admitting it to probate is a nullity, and no mere lapse of time will prevent one from urging the invalidity of the will and the probate. See *Janes v. Cherokee Lodge*, 110 Ga. 627, in which the will involved in the present case was adjudged to be inoperative; *Fortner v. Wiggins*, 121 Ga. 26, and cit.; *Castens v. Murray*, 122 Ga. 396. Counsel for the plaintiffs in error practically concede that they can not rely upon the will of Ambrose Mills as a muniment of title, but claim that the defendant and those under whom he claims are estopped from urging its invalidity. Persons interested in property which a void will purports to dispose of may be so situated that they will not be heard to urge the invalidity of the will. It is therefore to be determined whether in the present case the defendant, or Jane A. King, or her children under whom he claims would be estopped from asserting the invalidity of the will as against the plaintiffs. The plaintiffs expressly claim as

devisees under the will, relying upon this estoppel. They in terms disclaim any interest in the property as heirs of Jane A. King. If the proof fails to show that they have a right to recover upon the theory of estoppel, then the nonsuit was proper, without reference to what may have been their rights as heirs at law of Jane A. King. Estoppels must be mutual. Therefore Jane A. King and the defendant would each be estopped as against the other from asserting that any greater interest than a life-estate passed under the deed made by her to the defendant. But the recitals in this deed as to the interests of her children would not of themselves operate as an estoppel upon either party, unless one or the other acted upon them to his prejudice. So with the deeds from the children of Jane A. King to the defendant. Each would be estopped from asserting that any greater interest than a remainder in fee, subject to a life-estate in Jane A. King, passed under the deeds. But the recitals in the deed of one child would in no event operate as an estoppel upon another child who had made a similar deed, although there might be an estoppel as to the interest to which the deed refers. But in none of the deeds is any reference made to the will of Ambrose Mills, or to any other instrument which it is claimed creates the life-estate and remainders in the different conveyances. The grantors may have intended by these deeds to deal with the title as having been derived under the will of Ambrose Mills, but there is nothing to indicate that the defendant so intended. The grandchildren of Jane A. King, who are plaintiffs, had no transactions whatever with the defendant in reference to the property, and they have not changed their situation on the faith of any recitals in the deeds from the children of Jane A. King; and there can certainly be no estoppel in favor of the grandchildren which would prevent the defendant from urging the invalidity of the will under which they claim. He did buy from her daughter, Jennie Messenger, one of the plaintiffs, but for the reasons above stated there would be no estoppel in that plaintiff's favor against him. The defendant was willing to purchase the life-estate of Jane A. King, and it was immaterial to him how this estate was created, whether by a person from whom she derived title, or whether it was an estate of her own creation. So he was willing to purchase from the children what they described as a remainder in-

terest, and it was immaterial to him how this estate was created, or whether it existed at all, so long as he obtained a conveyance which would estop them from asserting any future interest in the property. There is nothing in the present record to make a case where parties have dealt with property as having been disposed of by an invalid will in such a way that they are estopped from denying the validity of the will. The plaintiffs have no right to recover, as the will which they relied upon as a muniment of title is absolutely void. The manner in which William E. Mills dealt with the property derived from his father's estate was immaterial to the present investigation, and the evidence offered in relation to the same was properly rejected. There was no error in rejecting the will of Ambrose Mills, nor in granting a nonsuit.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

JONES v. GAMMON.

LUMPKIN, J. 1. An agreement between an owner of land and his tenant provided, among other things, that the landlord agreed that the tenant "may clear up ten acres of woodland on lot number 158, . . . each year, and may have the wood cut off said ten acres and crop for next year, said party of the second part [the tenant] to cut and clear said woodland, beginning on the north side, contiguous to land recently cleared. . . . Upon the full and complete performance by the party of the second part with this contract, he . . . shall have the refusal of said farm at same price and privileges for the years 1904, 1905, and 1906." *Held*, that on the face of this paper, unaided by extraneous evidence, it did not confer any right upon the tenant to cut wood except on lot number 158.

2. When the evidence, in addition to the written contract, is considered, there was conflict in material particulars, and the presiding judge did not abuse his discretion in granting an injunction.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Argued April 22, — Decided May 13, 1906.

Injunction. Before Judge Henry. Floyd superior court. March 11, 1905.

Gammon filed his petition seeking to enjoin Jones from cutting timber on certain lots of land in Floyd county, alleging that the timber constituted their chief value, that the damage would be irreparable, and that the trespass was continuing in character and would involve a multiplicity of suits. The defendant claimed

the right to cut the timber under a certain contract of rent between himself and plaintiff, containing, among other things, the following clauses: "The party of the first part [Gammon] agrees, and it is understood, that the party of the second part [Jones] may clear up ten acres of woodland on lot No. 158-3 and 23-[apparently meaning 3d section, 23d district] each year and may have the wood cut off said ten acres and crop for next year, said party of the second part to cut and clear said woodland, beginning on the north side, contiguous to land recently cleared. In consideration for wood so given, the party of the second part agrees to deliver to the party of the first part, Gammon, twenty (20) cords dry wood, at his residence in the town of East Rome. All wood and timber necessary for fire-wood for party of the second part and his hand or tenants, to be obtained from said ten acres above mentioned. . . This contract is to begin Jan. 1, 1903, but it is understood and agreed that upon the full and complete performance by the party of the second part with this contract, he, the said Jones, shall have the refusal of said farm at same price and privileges for the years 1904, 1905, and 1906." The plaintiff alleged, that the place where the defendant was cutting wood when the injunction was applied for was not on land lot No. 158, but on land lots Nos. 121, 122, 159, and 160. The defendant sought to show that the intention of the contract was that the plaintiff was to give him "forty acres of wood" in four years; that the figures, 1904, 1905, and 1906, and the words "each year," were interlined in accordance with such intent; that he was not to be confined to cutting on land lot 158; that there were only about twelve or thirteen acres of woods on that land lot; that after cutting this he informed plaintiff, and the latter recognized his right to cut more wood, and told him to cut from a little three or four acre tract on lot 122; that the defendant did so; that they had a lawsuit, and afterwards the plaintiff refused to tell him where to cut further. The evidence was conflicting on material points. The plaintiff testified, that he did not authorize the defendant to cut any timber on land lots numbers 122, 160, and 159, but on the contrary, personally and by letter, notified the defendant that he must not do so. Another witness testified, that there were thirty-five or forty acres of woodland on part of land lot No. 158, when defendant moved on it in the winter of

1902 and 1903, and that the defendant had cut and moved all the wood from it. There was other conflicting evidence. The judge granted an injunction, and the defendant excepted.

Seaborn & Barry Wright and F. W. Copeland, for plaintiff in error. *M. B. Eubanks*, contra.

HILL *et al.* v. TERRELL.

123	49
128	486
123	49
129	710

1. Where a testator bequeathed property to his grandchildren, children of his daughter, and declared, "It is also my will, desire, and intention, that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children at the time of his or her death, that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to and be equally divided between her surviving children and their legal representatives," this created in a grandchild of the testator an estate in fee, subject to be terminated or divested if, after marriage, such grandchild should die without leaving any child or children at the time of her death.
2. A child of a grandchild of the testator took no estate in remainder under the provision of the will above quoted.
3. Construing such provision of the will in connection with its context, and with the entire will, there is nothing to change the construction just announced.
4. No estoppel was pleaded, nor is there any distinct ruling of the trial court on that subject; nor do the facts alleged in the petition as to a mistake in the receipt given to the executor by the plaintiff, as guardian for his child, show that any estoppel existed.

Argued April 24,—Decided May 13, 1905.

Equitable petition. Before Judge Freeman. Meriwether superior court. September 6, 1904.

On June 5, 1879, Hon. Hiram Warner executed his will. It was probated in August, 1881. In 1904 E. B. Terrell filed his equitable petition, making Hiram Warner Hill, as executor of the deceased, and Kittie Hill Terrell parties defendant, and alleging in brief as follows: Kittie Hill was the granddaughter of the testator, being the daughter of his daughter, Mary J. Hill. On December 26, 1892, she and E. B. Terrell, the plaintiff, intermarried. On July 17, 1898, a daughter, Kittie Hill Terrell, was born to them, and shortly thereafter Mrs. Terrell died. Kittie Hill reached the age of twenty-one before she intermarried with the

plaintiff. Her estimated share of the fund mentioned in the 5th item of the testator's will approximated \$25,000. She permitted this, however, to remain in the hands of her brother, the sole acting executor, as long as she lived. A few months after the death of Mrs. Terrell this share was turned over to her husband, the plaintiff, as natural guardian for his child, Kittie Hill Terrell, and a receipt was given to the executor, in which it was stated that the minor child was entitled to the share of her mother as remainderman under the will of the testator, and which contained the following clauses: "And I, E. B. Terrell, father and guardian of Kittie Hill Terrell, as aforesaid, have received of H. W. Hill, executor of the last will and testament of Hiram Warner, deceased, the following bonds and money, being all that is in his hands for distribution under said will of Hiram Warner, deceased, belonging to my said ward, Kittie Hill Terrell, to wit, \$23,500.00 in bonds, and \$219.00 in cash." The petition proceeds: "Your petitioner avers that at the time he executed the aforesaid receipt he had no idea that he himself had any interest in the fund which his said wife had left at her death, but believed the same belonged entirely to his minor child, the said Kittie Hill Terrell, and he was induced so to believe by the unlimited confidence which he placed in the statement of the said Hiram Warner Hill, whom petitioner knew to be his friend, who was the executor of his grandfather, and was withal a very able and distinguished lawyer. Relying upon the statement of said executor, he executed the receipt aforesaid, presented to him by and in the handwriting of the executor. . . Your petitioner has never for one moment believed that said H. W. Hill, executor as aforesaid, in the statement he made to petitioner was guilty of any intended artifice or deception or fraudulent practice; on the contrary, he thinks the executor was honestly mistaken as to the true construction of his testator's will, relying possibly upon the popular opinion entertained that no one would ever enjoy any of testator's property who was not of his blood, rather than upon a critical examination of the provisions of said will." He gave a bond as guardian of his daughter, and was not aware that he had any interest in the estate until very recently, when in a conversation with a friend it was suggested to him; and upon having the will carefully examined by counsel, he reached the conclusion that

the share of his wife vested in her absolutely, and that upon her death he and their minor child inherited this share equally, instead of it passing entirely to the child. He contended that the turning over of this share to him as guardian, and the giving of the receipt above stated, resulted from a mistake; and he prayed that it be decreed, that his wife, Kittie Hill Terrell, was the owner in fee of her share of the fund bequeathed by her grandfather, Hon. Hiram Warner, deceased, in the fifth item of his will; that, she having died intestate, he and their minor child, Kittie Hill Terrell, inherited such share equally; and that the receipt given to the executor be delivered up to be canceled; and that in its place two other receipts should be executed by him, one individually, and the other as natural guardian for his child, each for an undivided half interest.

The executor in his answer insisted that under a proper construction of the will of the testator, the share going to the testator's granddaughter, Kittie Hill (afterwards Mrs. Terrell), under the fifth and tenth items of the will, did not pass to her absolutely, or in fee, but that by those items a life-estate in her was created, with a remainder to her child, and therefore her child was entitled to the estate, and her husband took no interest; and that the receipt given by the plaintiff as guardian was properly given and should not be canceled. The defendant further alleged that the testator had but one child, Mrs. Mary J. Hill; that she married A. F. Hill, who was living at the time of the execution of the will (she living with him); and that the son-in-law was not a legatee under the will, and not mentioned in it.

The will contained eleven items. The first directed the payment of the testator's debts, and the erection of a suitable monument over his grave. The second bequeathed to his grandson, Hiram Warner Hill, his gold watch and library. The third bequeathed to his grandson, Burwell O. Hill, his horse and buggy, and such other horses, mules, wagons, and plantation tools as he might have at the time of his death. The fourth bequeathed to his daughter, Mary J. Hill, \$1,000, to dispose of absolutely as she pleased. The remaining items were as follows:

"Fifth. It is my will and desire that after the payment of the specific legacies hereinbefore enumerated, and expenses of administration, including the expenses of erecting a suitable monument

as specified in the first item of this will, that all money remaining on hand, if any, and all that may be due me by notes, bonds, or other evidences of debt, shall be invested, by my executors herein-after named, in bonds of the State of Georgia, or bonds of the United States, or in safe and solvent railroad bonds of this State, or in mortgages upon unincumbered real estate with waiver of homestead, drawing interest, for the benefit of the children of my daughter, Mary J. Hill,—that is to say, the principal and the annual or semiannual interest accruing thereon (if not already invested at the time of my death) shall be so invested for the benefit of the children my said daughter now has, or may hereafter have born, share and share alike, in the following manner, that is to say, whenever any one of her children shall arrive at the age of twenty-one years or marries, then he or she shall receive his or her share of said fund at that time, and the balance thereof continue to be invested, drawing interest for the benefit of the others. It being my desire and intention that this fund shall be invested as before directed, with the annual and semiannual interest accruing thereon, for the benefit of all my daughter's children, and that their respective shares thereof be paid to them as they shall respectively come of age or marry, each one's share to be estimated at the time of the payment thereof, and in the event any of her children should die before marriage or arriving at the age of twenty-one years, his or her share of said fund is to be equally divided between her surviving children or their legal representatives, to wit, her grandchildren, provided any of her children should die leaving children. It is also my will, desire, and intencion, that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children at the time of his or her death, that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to and be equally divided between her surviving children and their legal representatives; and my executors are hereby directed to take a receipt from each legatee to that effect.

“Sixth. I direct that the lot of land owned by me in Gilmer county and the lot of land owned by me in the 11th district of Meriwether county be sold by my executors, and the proceeds thereof be invested for the benefit of my daughter's children, as hereinbefore specified in the fifth item of this will.

"Seventh. In the execution of my will and desire, I do hereby devise and bequeath all of the residue and remainder of my estate, not otherwise disposed of by this will, to my daughter, Mary Jane Hill, for her sole and separate use, during her natural life, and at her death to be equally divided among her children living at the time of her death and their legal representatives; the share or portion of her female children is expressly devised and bequeathed to them for their sole and separate use and benefit. It is to be expressly understood, and such is my declared wish, will, and intention, that the life-estate in my lands hereby devised to my daughter is not to be so managed or cultivated as to injure or prejudice the rights or interest of her children as remaindermen, but that the same shall be cultivated and managed prudently and discreetly during her life, without waste or injury to the corpus of the property, but, so far as it is possible to do so, to improve it for the benefit of her children, who I intend shall have the benefit of it after her death; and this devise of my land during her life is made upon that express condition. It is also my intention, as to this clause of my will, that if at the time of my daughter's death any of her children shall have died leaving children, that the latter shall represent their deceased father or mother and take the share or portion which he or she would have been entitled to if living at the time of my daughter's death.

"Eighth. If at any time before my death I should advance either of my daughter's children by giving them money or property, such advancement is to be deducted from his or her share of my estate on a division thereof.

"Ninth. If I should own any town or city property at the time of my death, then it is my will and desire that the same shall be sold by my executors at public sale and the proceeds thereof be invested for the benefit of my aforesaid grandchildren, in the same manner and for the same purposes expressed in the 5th item of this my will.

"Tenth. It is my will and desire and I do hereby direct that the legal title to all and singular the property devised and bequeathed to my female grandchildren by this will or any clause thereof shall be vested in my executors in trust for my female grandchildren, that is to say, my said executors are to hold and have vested in them the legal title to the corpus of the property

devised and bequeathed to my female grandchildren as aforesaid, in trust for their use and benefit and for their protection, and are to pay to them annually the interest or income of their respective shares thereof, when they shall arrive at twenty-one years or marry, taking their separate receipts therefor.

"Eleventh. Believing myself competent to dispose of my worldly effects by will, I have done so, and hope that the courts of the country will see to it that it is executed in accordance with my expressed intentions, and not after my death be passing orders at the instance of interested parties to alter and change the directions contained in my will, as is sometimes done under one pretext or another. Lastly, I nominate and appoint my brother, Obadiah Warner, and my grandsons, Burwell O. Hill and Hiram Warner Hill, as executors of this my last will and testament, and hereby charge them and each of them with the faithful execution thereof according to its true intent and meaning as hereinbefore expressed.

In testimony whereof I have hereunto set my hand and seal to the foregoing annexed seven written pages. This 5th day of June, 1879. [Interlined before signing, with different ink.]"

The case was, by consent, submitted to the presiding judge without a jury. He held, that "Kittie Hill Terrell, wife of the petitioner, E. B. Terrell, in the property referred to . . . under the 5th item of the will of her grandfather, Hiram Warner, deceased, take an estate in fee, subject to be divested upon her dying without children. She having died leaving one child and her husband, the petitioner herein, they are entitled to said property in equal shares, as the heirs at law of the said Kittie Hill Terrell." He accordingly directed that the receipt which had been given the executor be delivered up for cancellation, and two receipts, one by E. B. Terrell individually, and the other by him as guardian of his minor child, each for a half interest in the property, should be substituted therefor. The defendants excepted.

H. W. Hill, for plaintiffs in error. The will created an estate for life in Kitty Hill, with contingent remainder to her children, or, in default of her dying without children, to the other beneficiaries named: Civil Code, §§ 3083, 3085, 3086; 75 *Ga.* 548; 110 *Ga.* 762-4; 2 McCord (S. C.), 84-100, and cit.; 1 P. Wms. 667; 3 Atk. 397; Plow. Com. 414; T. Raym. 453; Cowp. 31; Id. 800; 3 Ves. 541; 2 Bl. Com. 381; 2 Fonb. 56; 1 Burr. 38. In-

tention of testator, cardinal rule of construction: Civil Code, § 3324; 116 *Ga.* 258; 115 *Ga.* 896; 75 *Ga.* 547; 72 *Ga.* 856, 859; 4 *Ga.* 464; 6 Wall. 478; 4 Ves. 329-30; 1 Redf. Wills, 136, 430, 435, 463. Necessary implications: 2 McCord, 92-3; 75 *Ga.* 548; 3 Atk. 397; 2 Bl. Com. 381; 3 Burr, 1686; 2 Fonb. 56; 1 Chit. Pl. 241-2; 1 Saund. 259, n. 8; 2 Bos. & Pul. 155; 4 East, 453; 2 H. Bl. 530; Coke, Litt. 303 (b). Executory trusts and contingent remainders: Civil Code, § 3156; 92 *Ga.* 772, 775; 99 *Ga.* 444; 30 *Ga.* 453; Hill, Trus. 318, 328; 1 P. Wms. 128; 16 Ves. 302; 3 Atk. 754; 7 Bac. Abr., Uses and trusts; Fearne Con. Rem. 124; 6 Pet. 68, 76. Estoppel: Ewart, Est. 3, 6; Bigelow, Est. 566, 574-5, 580; 96 U. S. 720.

John W. Park, Orville A. Park, and S. W. Harris, contra, cited Civil Code, § 3083; *Ga. R.* 30/638, 707; 46/247; 68/370; 81/120; 85/552; 102/181; 106/751; 113/210; 75/540; 12/156; 41/554; 47/455; 95/699; 110/707; 100/478; Redf. Wills, *432-3.

LUMPKIN, J. This case presents some unusual features. When the Supreme Court of Georgia was organized under the act of December 10, 1845, Honorable Hiram Warner was one of the three Judges first elected. The second opinion which appears in the printed reports of this court (1 *Ga.* 5) bears his name. For many years he was a member of the court, and for a long time presided as Chief Justice. He took part in the construction of many wills; and now, after his death, his own will comes before this court for construction. It is also somewhat an unusual fact that the petition states that it is based in part upon the opinion of another distinguished ex-Chief Justice, Honorable Logan E. Bleckley.

The controversy arises over the proper construction of the fifth item of the testator's will. In it he provided, that after the payment of specific legacies and the expenses of administration, all the remaining money in hand, or that might be due him, should be invested by his executors in bonds or mortgages "for the benefit of the children my said daughter now has, or may hereafter have born, share and share alike;" that "whenever any one of her children shall arrive at the age of twenty-one years or marries, then he or she shall receive his or her share of said fund at that time, and the balance thereof continue to be invested, drawing in-

terest, for the benefit of the others;" that "in the event any of her children should die before marriage or arriving at the age of twenty-one years, his or her share of said fund is to be equally divided between her surviving children or their legal representatives, to wit, her grandchildren, provided any of her children should die leaving children." Then follow the words which especially require construction. They are as follows: "It is also my will, desire, and intention, that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children at the time of his or her death, that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to and be equally divided between her surviving children and their legal representatives; and my executors are hereby directed to take a receipt from each legatee to that effect." The plaintiff contends, that, under this item of the will, the granddaughter of the testator took an estate in fee, subject to be divested if she should die after marriage without leaving child or children; that she having a child at the time of her death, the condition upon which her estate might have been divested no longer existed; and that her estate being absolute at her death, her husband and child were entitled to share equally in the property so left by her. On the other hand, the defendant contends, that, under this item of the will, the testator created a life-estate in his granddaughter, Kittie Hill, with remainder to such children as she might have at the time of her death; that having only one child, the entire estate passed to it; and that her husband took nothing as heir of his wife.

It is clear that the estate bequeathed by the testator to his granddaughter was not expressly limited to a life-estate. Neither is there any express gift or bequest to the children which she might leave. The question, then, is narrowed to this: Did the testator intend such a limitation or remainder to arise by implication, and did the language employed by him create such a limitation or remainder over? Since 1821, it has been the law of this State that the word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance properly executed shall be construed to convey the fee, unless a less estate is

mentioned and limited in such conveyance. Civil Code, § 3083. Provisions in wills similar to that now under consideration have been construed a number of times by this court. In *Groce v. Rittenberry*, 14 Ga. 232, it was said: "Where personal property was bequeathed to S. G., and if he should die without any child living at his death, then to the children of L. G. and J. A., and S. G. died leaving his wife *enceinte* with a child, which was afterwards born, and lived for some time, but subsequently departed this life: Held, that such bequest was in the nature of an executory gift to the children of L. G. and J. A., to take effect upon the defeasance of the prior gift to S. G. Held, also, that for the purposes of this bequest, the child, *en ventre sa mere*, was a child living at the death of its father, S. G." In *Harris v. Smith*, 16 Ga. 545, is the following ruling: "A testator gave real and personal estate to D. F. H., with the provision that if he should 'die leaving no lawful heirs, then, in that case, it is my will that all of the said property shall be divided, share and share alike, between the children of J. C. F.': Held, that these words vested in D. F. H. an estate in fee, subject to an executory devise of the lands, and bequest of the personal property in favor of the children of J. C. F., if the said D. F. H. should die without children living at the time of his death." In *Burton v. Black*, 30 Ga. 638, 644, a similar ruling is made, and the subject is fully discussed. Stephens, J., says: "An obvious restriction upon the principle of reasoning by inference is, that resort to it shall be had only in the absence of expressed intention;" and he holds, that a bequest to one and his heirs would not create a fee simple more effectually under our law than by being to him without the added words of inheritance, and that the only effect of providing that the estate should go to some other person if the first taker should die without children is to attach a condition to the fee in him which would terminate it if he should die without children. A like construction has been placed upon similar bequests, in *Hill v. Alford*, 46 Ga. 247; *Gibson v. Hardaway*, 68 Ga. 370; *Matthews v. Hudson*, 81 Ga. 120; *Chewning v. Shumate*, 106 Ga. 751; *Davis v. Hollingsworth*, 113 Ga. 210; *Sumpter v. Carter*, 115 Ga. 893. Thus this court has held, with great uniformity, that unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision

that if he shall die childless the property shall pass to some other person, conveys to him a fee, subject to be divested upon his dying childless, or, as it is sometimes called, a base or qualified fee, and does not confer upon any child which he may have any interest or estate in remainder in the property. Estates by implication are not favored. *McCord v. Whitehead*, 98 Ga. 385. In the harmony of these decisions there is but a single note of discord. In *Wetter v. United Hydraulic Cotton-Press Co.*, 75 Ga. 540, the words, "and should they two be survived by my said daughter, and she, my said daughter, subsequently die without issue, as aforesaid, then living, then it is my will that the whole of my estate vest in and belong to my own next of kin then living and their heirs forever," when construed in connection with the entire will and the circumstances surrounding the testatrix, created a remainder in favor of the children of her daughter, and did not invest her with a fee determinable upon dying without issue. In regard to this decision several things may properly be said. The opinion was written by Hon. Marshall J. Clarke, Judge of the superior court of the Atlanta circuit, presiding instead of Jackson, C. J., who was disqualified. He based his opinion in part upon the fact that the will was drawn without regard to technical rules. He said (p. 544), "It would be especially unjust to apply technical rules to an instrument manifestly drawn without reference to them. The will of Mrs. Cobb is a paper of this character." No such statement as this could be made in regard to the will of the ex-Chief Justice of this court, which was doubtless drawn by himself, and which evinces on its face great care and particularity to express his intention, and to leave nothing to implication. Moreover, the will which was under consideration in that case was probated in 1839, when the old law in regard to marital rights prevailed. That decision has been discussed and criticised in *Matthews v. Hudson*, 81 Ga. 126, supra; and if it can stand at all, it must be on its own peculiar facts. It was also delivered in 1885, some years after the death of Judge Warner, so that he could not have drawn his will with the ruling there made in view, or have been influenced in any respect by it.

In the case of *Hill v. Alford*, 46 Ga. 247, supra, Chief Justice Warner delivered the opinion of the court in 1872. The will then under consideration contained the following items: Item 5. "It

is my will, that, as my children should marry or become of age, my executor shall give off to such child such portion of my estate as he may think best, for the purpose of managing and controlling and deriving the profits or income to himself; but the title to such property shall not be divested from my estate, nor such child acquire any title to the same; but said property shall belong to my estate until the youngest child shall marry or become of age, and then shall be brought into the general fund, to be divided among all my children equally, share and share alike."

Item 6. "My further will and desire is, that should all my children die, without leaving children at the time of their death, that all my property shall be made a poor-school fund of, to be placed under the control of the 'Inferior Court of Putnam County,'" etc. The testator died, leaving three sons, two of whom died, leaving no children, before Andrew, the youngest, became of age or married. The following extracts from the opinion of the Chief Justice will show how strong and clear were his views on the subject. "There is no ambiguity on the face of the testator's will, which would authorize the introduction of parol evidence to explain it; but the words thereof are to be construed according to their legal effect, and the intention of the testator must be derived from the plan, unambiguous words which he has employed in making his will. . . The estate of Andrew in the land under the will was not contingent upon his leaving children, as has been supposed, but was a vested fee, subject to be divested in the event he died without children. . . The fee which Andrew took in the land under the will was a qualified or base fee, because there was a qualification annexed thereto, to wit, that if he died without children it was to go over by way of executory devise to the Inferior Court of Putnam county. . . If there should be any doubt whether the devisee in this case took an absolute estate in the land at common law, there can be none under the provisions of the act of 1821, which declares that all devises of real property shall vest in the person to whom the same are made an absolute, unconditional fee-simple estate, unless it be otherwise expressed, and a less estate mentioned and limited in such devise. . . It was said, on the argument, that it was the intention of the testator that his grandchildren should take his property, in the event his sons died leaving children, but there

are no words in the testator's will which will authorize a court to say so; for, as it was said by this court in *Wright vs. Hicks*, 12 *Georgia Reports*, 156, 'Courts are not permitted to give effect to the will of a testator, contrary to the plain and obvious terms used by him, upon a *mere conjecture* as to his intention.' The same learned jurist who announced this opinion left his own will a few years later. An examination of it will show that it was prepared with the utmost care to express all the intention which his testamentary scheme embraced. As already stated, there is no express limitation of a life-estate in his granddaughter, with remainder over to her child. If there were any such remainder at all, it would arise by implication. The testator knew the danger of entering into the realm of conjecture, as indicated by his opinion above quoted. Indeed, after carefully and exhaustively dealing with his entire testamentary scheme, he uses the following striking words: "Believing myself competent to dispose of my worldly effects by will, I have done so, and hope that the courts of the country will see to it that it is executed in accordance with my expressed intentions, and not after my death be passing orders at the instance of interested parties to alter and change the directions contained in my will, as is sometimes done under one pretext or another." In the last item of the will he again refers to his intent and meaning as "hereinbefore expressed." He was careful to ask that his will be executed in accordance with his *expressed* intentions. He evidently desired to guard against the possibility of acting upon "mere conjecture," to which he referred in his decision. He believed in expressed language rather than in implication. In *Carlton v. Price*, 10 *Ga.* 497, he said: "When the intention of testators and the laws of the land are in conflict, the latter must prevail."

In view of all these facts, we do not think that this provision in the will can be construed to have a different meaning from that which the testator himself had put upon a similar provision in another will, or that an estate in remainder by implication should be raised against his declared desire that the *expressed* intentions of his will should be carried out. Nor do we think that other provisions of the will or the context alter this construction. It will be noted that several times in the fifth item the testator uses the expression, "for the benefit of the children of my daughter;"

which does not indicate an intention to limit the bequest to such children to a life-estate. It was also provided, that whenever one of his daughter's children should arrive at the age of twenty-one years or marry, he or she should receive his or her share of the fund at that time. It was declared that, in the event any of the testator's grandchildren should die before marriage or arriving at twenty-one years of age, his or her share should be equally divided between the surviving grandchildren or their legal representatives (their children, if any). This, however, in no way conflicts with the fact that if one of the children arrived at twenty-one years of age, and married, and thereupon received his or her share, it should be in fee. The testator provided for both contingencies: first, in case of death before marriage or arriving at twenty-one years of age, the property should go as directed; and secondly, in case of death after marriage without leaving any child or children, a different disposition was made.

The use of the word "also" in the expression "it is also my will" does not create any remainder interest in favor of the children of the testator's grandchildren. This word not only has the meaning of "in like manner," or "likewise," but it has a further meaning of "in addition, besides, as well, further, too." Having made one provision in one contingency, he made an additional or further provision in another contingency.

The direction in the tenth item of the will, that the executors should hold the property devised to the testator's female grandchildren in trust for them does not operate to limit the interest of such grandchildren to a life-estate, or to create an estate in remainder for their children.

Construing the fifth item of this will alone, or in connection with the entire will, we are of the opinion that the estate created in favor of the testator's granddaughter, Kittie Hill, was an estate in fee, subject to be divested or terminated upon her dying without child or children at the time of her death; and that it did not create any estate in remainder in favor of her child. It follows that upon Mrs. Terrell's death intestate, after marriage, leaving a child, this share passed as any other fee-simple estate left by her.

2. It does not appear that any estoppel was pleaded, and it is doubtful if that question is sufficiently made to require adjudication. But if the allegations of the petition be taken as true, the

plaintiff does not appear to be estopped by reason of a mere mistake in receipting to the executor.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

LOUISVILLE & NASHVILLE RAILROAD CO. v. WILSON.

1. A widow has an interest in the unburied body of her deceased husband, which the courts will recognize.
2. Where a declaration alleged that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; that the agent of the company at the initial point would only sell her transportation for the body to the junction, but told her that the company would carry the body to the place of burial, and that at the point of junction she could obtain transportation to the destination; that she paid for such transportation to the junction, and delivered the body, with its accompanying shroud and coffin, to the company; that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would be protected from the weather; and that the coffin and shroud were damaged to the extent of \$75, and the body was "soaked and otherwise mutilated": *Held*, that the declaration set out a cause of action.

Argued April 13, — Decided May 15, 1905.

Action for damages. Before Judge Seabrook. Warren superior court. September 10, 1904.

Penina Wilson brought suit against the Louisville and Nashville Railroad Company, a foreign corporation, as the lessee of the Georgia Railroad and Banking Company, a corporation under the laws of Georgia. She alleged that the defendant company had damaged her in the sum of \$2,000, for the following reasons: On or about the 12th day of March, 1903, her husband, Hamp Wilson, died in Atlanta, Georgia. After his death she delivered his body to the defendant company, to be carried from Atlanta to Warrenton, Georgia, where it was to be buried. Defendant has a railroad and operates trains between said places. She notified the defendant that she was going to carry her husband's body to Warrenton, and offered to pay for the transportation thereof. The agent at Atlanta refused to sell her transportation further than to Camak, a junction point on the defendant company's

road. Petitioner paid defendant for the transportation to Camak, and informed it that she was going to carry the body of her husband on to Warrenton. The said agent informed petitioner that the body of her husband would be carried by the defendant company, and that she could buy transportation from Camak to Warrenton. Defendant agreed to transport the said body of petitioner's husband from Atlanta to Warrenton, and accepted pay therefor. When the train bearing the body of her husband arrived at Camak, in the county of Warren, the coffin containing it was taken from the train by the defendant company and placed on an open platform, and there allowed to remain several hours until defendant's train going to Warrenton arrived. When the said body was taken from the train, it was night, and raining. Petitioner and others requested the agent of the defendant company at Camak to have said body placed where it would be protected from the rain and weather, but he refused to do so. Petitioner shows that as a result the said body of her husband, the shroud, and coffin were "soaked and otherwise mutilated." By reason of the facts above set forth, said coffin and shroud were damaged to the amount of \$75, and she was subjected to great humiliation and shame and mental suffering. Defendant was a common carrier. She charged that it was wanting in ordinary care, and in fact was grossly negligent. She also alleged a property right in the coffin and shroud. The defendant company demurred generally to the petition. The court overruled the demurrer, and to this ruling the defendant excepted.

Joseph B. & Bryan Cumming, for plaintiff in error.

L. D. McGregor, Burton Smith, and J. A. Branch, contra.

LUMPKIN, J. (After stating the facts.) Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law — that rule of action which touches all human things — must touch also this thing of death. It is not surprising that the law relating to this mystery of what

death leaves behind can not be precisely brought within the letter of all the rules regarding corn, lumber, and pig-iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment, or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead, and rights surrounding their bodies. In doing this, the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead, and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes. It is said that burial in churchyards was introduced into England by Cuthbert, Archbishop of Canterbury, in the year 750 A. D. At an early date the church began to take jurisdiction in regard to places of burial and the sepulture of the dead. This jurisdiction gradually became more enlarged and more firmly fixed, until the ecclesiastical courts left little for the common-law courts to decide upon those subjects. Thus it was that Lord Coke said, that the burial of a corpse belonged to ecclesiastical cognizance; but the heirs had an action for defacing the monument (1 Inst. 4, 18 B; 3 Inst. 203); and so it was that Blackstone made use of the much-quoted expression, "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral." 2 Bl. Com. 429. See Hammond's ed. 651, and note on p. 653.

The subject of the right of burial, and the protection of the bodies of the dead arose in the matter of the widening of Beekman street in the City of New York, and was referred to Hon. Samuel B. Ruggles, as referee. He made a learned and elaborate report, which was confirmed by the court. It will be found in 4 Brad. R. 503, et seq., and from it the following excerpts are taken:

"The power thus exercised by the ecclesiastical tribunals was not spiritual in its nature, but merely temporal and juridical. It was a legal, secular authority, which they had gradually abstracted from the ancient civil courts, to which it had originally belonged; and that authority, from the very necessity of the case, in the State of New York, must now be vested in its secular courts of justice. The necessity for the exercise of such authority, not only over the burial, but over the corpse itself, by some competent legal tribunal, will appear at once, if we consider the consequences of its abandonment. If no one has any legal interest in a corpse, no one can legally determine the place of its interment, nor exclusively retain its custody. A son will have no legal right to retain the remains of his father, nor a husband of his wife, one moment after death. A father can not legally protect his daughter's remains from exposure or insult, however indecent or outrageous, nor demand their reburial, if dragged from the grave. The dead, deprived of the legal guardianship, however partial, which the church so long had thrown around them, and left unprotected by the civil courts, will become, in law, nothing but public nuisances; and their custody will belong only to the guardians of the public health, to remove and destroy the offending matter with all practical economy and dispatch. The criminal courts may punish the body-snatcher who invades the grave, but will be powerless to restore its contents. . . The sacred relics of Mount Vernon may be torn from their 'mansion of rest,' and exhibited for hire in our very midst, and no civil authority can remand them to the tomb. . . It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. . . The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body? The right to the repose of the grave necessarily implies the right to its exclusive possession." The report of the referee has been criticised by a writer in 10 Central Law Journal, 303, but it has been cited with approval by nearly all the courts which have since dealt with the questions there involved. It is said Mr. Ruggles added a note to the original report, in explanation of the term

"next of kin," stating that it "was not employed for the purpose of denying or questioning the legal right of a surviving husband to bury his wife's remains, or to reinter them if disturbed." *Hackett v. Hackett*, 18 R. I. 157. For those who desire to consult law literature on burial grounds, burials, etc., an extended list will be found in a note to 18 *Abbott's New Cases*, 75.

In *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, it was held, that "while a dead body is not property in the strict sense of the common law, it is quasi property, over which the relatives of the deceased have rights which the courts will protect." Potter, J., delivered an able opinion in that case, reviewing the matter both from the standpoint of history and of authority. In *Larson v. Chase*, 47 Minn. 307, it is held, that "the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it,—such as an unlawful mutilation of the remains,—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved." In *Bogert v. City of Indianapolis*, 13 Ind. 135, it was held, that "The bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." In *Renihan v. Wright*, 125 Ind. 536, it was held that "Where a husband and wife employed undertakers to keep the body of a deceased daughter until they might be ready to inter it, and the defendants negligently took or allowed it to be taken and buried, or otherwise disposed of it, an action for damages would lie." In *Doxtator v. Chicago & Western R. Co.* (Michigan, 1899), 45 L. R. A. 535, a similar rule was recognized, but a recovery was denied on other grounds. See also 6 Am. L. Rev. 182; 8 Am. & Eng. Enc. Law (2d ed.), 835; *Foley v. Phelps*, 1 N. Y. Supr. Ct. App. Div. 551; *Hackett v. Hackett*, 18 R. I. 155, *supra*.

In this State the right of the owner of an easement of burial in a cemetery lot, or one who is rightfully in possession of it, to recover damages from a person who wrongfully enters upon it

and disinters the remains of persons buried therein, has been recognized; and it was held, that in a suit for wrongfully disintering a dead body, if the injury has been wanton and malicious, or the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518; *Boumillot v. Gardner*, 113 Ga. 60. In *Wright v. Hollywood Cemetery Corporation*, 112 Ga. 884, it was held, that an unlawful and unwarranted interference with the exercise of the right of burial was a tort which gave to the grandmother and brother of the deceased, who were proceeding to have the corpse interred, a right of action; and the same ruling was made with respect to the damages recoverable as in the case of *Jacobus v. Congregation of the Children of Israel*, supra. From these decisions it will be seen that in Georgia, where ecclesiastical courts have never been recognized, rights with respect to burial, cemeteries, and dead bodies are protected by the secular courts. Indeed, if this were not so, and if all matters which were cognizable by the ecclesiastical courts, and thus withdrawn from the common-law administration, could not be dealt with by the courts of this State, many most important rights would be left unprotected. Thus, until a comparatively recent date, in England the jurisdiction of the ecclesiastical tribunals included, among other things, cases of marriage, divorce, and testamentary causes. In *Turner v. Thompson*, 58 Ga. 221, it is said, "Our own statute, which adopted the English common law and the old English statutes, adopted them only where applicable to our people in this new country, and the circumstances surrounding them here."

Some courts have quoted the statement from Blackstone set out above, and announced in broad language that a dead body is not the subject of property. But when particular cases arose, it generally became necessary to hold that a husband or wife, or next of kin, did have an interest in the body of the deceased, which the law would protect, whether that interest and the right of control and possession was technically denominated property, or quasi property, or by some other name. If this is not true, for stealing or wrongfully withholding the custody of a dead

body there might be an action for damages in some cases, but no method of recovering or restoring the body to its proper resting place. An illustration of the class of cases just referred to is *Meagher v. Driscoll*, 99 Mass. 281. This decision announced that a dead body was not the subject of property, and that after burial it became a part of the ground to which it had been committed. Yet, for an improper disinterring and removing of the remains it was held that an action of tort "in the nature of trespass quare clausum fregit" would lie, and if there was a wilful disregard or careless ignorance of the plaintiff's rights, the injury to his feelings might be considered in measuring damages. Nevertheless, the same court held, at a later date, that "an action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fail on the ground that there was no right of property in the dead body." In the decision the case of *Meagher v. Driscoll* is cited, not as conflicting with, but rather supporting the later adjudication. *Burney v. Children's Hospital* (Mass. 1897), 38 L. R. A. 413. If, then, there is a property right, or a quasi property right, in a dead body, subject of course to the necessity for proper disposition, and not to allow it to become a nuisance or injurious to the public welfare, what is the status of the defendant company which undertook to transport it for hire? In *Hale v. Bonner*, 82 Texas, 33, it was held, that a declaration by a widow against a railway company for negligence in the delivery of the body of her husband shipped upon such railway, causing delay in the funeral, by reason of which decomposition resulted, set out a cause of action. In *Beam v. Cleveland Ry. Co.*, 97 Ill. App. 24, it was held, that "A brother of a deceased person, who undertakes to pay for the transportation of his body from the place of his death to that of his burial, has such an interest in the dead body as entitles him to damages for an injury to it by the negligent act of the railway while transporting it for hire." This was not a decision of the highest court of the State, but is nevertheless a decision which may be properly cited and considered. In *Hockenhammer v. Lexington & Eastern Ry. Co.* (Ky. App., 1903), 74 S. W. 222, a suit was brought against the railway company for striking with one of its trains a wagon containing the corpse of a child,

and throwing it to the ground. On the subject of the right of the father in regard to the corpse of his child, after citing various authorities, it is said, "We therefore conclude that the great weight of authority sustains the rule that there is a legal right in the bodies of the dead, which the courts will recognize and protect by the proper action, as the case may be." The recovery was denied on the ground that the petition did not allege any injury to the corpse. It was said, that if the child had been alive, and was simply thrown down, but not hurt, there could have been no recovery; and that a like rule would be applied, by analogy, to its body. See also Perley on Mortuary Law, 103.

Apparently conflicting with these various adjudications, in *Griffith v. R. Co.*, 23 S. C. 25, it was held, that "An administrator has no property in the cadaver of his intestate, and therefore can not maintain an action for its wilful and negligent mutilation, but he may sue for injury to the wearing apparel of the deceased." In that case a man was murdered and his corpse placed on a railroad track to conceal the crime, and it was run over and mutilated by the trains. It also involved the review of a reversal by the judge of a referee's report, on the ground that the alleged negligence had not been proved. The direct ruling on the subject of property rights in regard to a dead body was, that the *administrator* had no such right. This was said to be "the precise point before us, i. e., the rights of the administrator," under the statute of South Carolina. In the course of the decision Simpson, C. J., makes use of the following language: "But can there not be a qualified property in the dead? one which gives control to some one with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead? And that when the life escapes the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound in life by the tenderest of ties can invoke the aid of no court in preventing its mutilation? And must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition. And yet such seems to be the fact; at least the matter is left in great doubt, so far as our limited examination of the

cases, both in this country and in England, amid the press of our duties, has enabled us to ascertain. Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered." We can not concur in this language as applicable to a husband or wife under the law of Georgia. The principle that for every right there shall be a remedy has been embodied in our code and adopted as statute law (Civil Code, §4929); although it was long before the adoption of our code announced by distinguished jurists. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 240, supra.

In the present case it is not necessary to enter into a discussion as to whether the defendant could have been compelled or not to receive this corpse for transportation, or on what agreement. The plaintiff alleges that the defendant did receive it, and agreed to transport it for hire. Nor is it necessary to discuss the difference between carriers and common carriers, or whether railroad companies are generally common carriers of corpses, as argued in the brief of counsel for plaintiff in error. The declaration in effect alleged, that the plaintiff delivered the body of her husband to the defendant, a common carrier, to be carried from Atlanta to Warrenton, where it was to be buried; that she notified the defendant of this intention, and offered to pay for transportation between the two places; that defendant's agent at Atlanta refused to sell her transportation further than Camak, a junction, on its road, but informed her that the body would be carried by the defendant, and that she could buy transportation from Camak to Warrenton; that she paid the transportation to Camak; and that the defendant agreed to transport the body from Atlanta to Warrenton and accepted pay therefor. Under these allegations, it will be seen that it was not in contemplation either of the plaintiff or of the defendant that there should be a final delivery or removal of the body with its accompanying coffin and shroud at this junction, but its temporary stop there was merely to await the defendant's other train to the place of destination. It was not the intention of either party that the body should merely be shipped to Camak, and there stopped. Fairly construed the allegations of the declaration mean that the body was to be transported from Atlanta to Warrenton; that both parties so understood and agreed; that as a part of the through transporta-

tion between these two points payment was made to the junction, and that payment was to be made from that point on to Warrenton. At Canak, the point of junction, therefore, the depositing of the coffin upon the defendant's platform did not constitute a final delivery to the plaintiff, which would exempt the defendant from all further duty or liability. Plaintiff alleges that she offered to pay the entire transportation, and there is nothing to indicate that she was not ready to pay the second part of it, or that any act on her part changed the duty of the defendant.

It certainly can not be said by the defendant company that a corpse is sufficiently property for a railroad company to receive and accept pay for its transportation, but is not sufficiently property to authorize a recovery for a breach of duty arising therefrom, or to prevent any duty from arising under such circumstances. If it received this body to be transported for hire, it was bound to discharge the duties arising from so doing, and for a failure to do so would be liable to an action. We do not know what facts the evidence may establish upon the trial, but we hold that, under the allegations of the declaration, which, as against a demurrer, are to be taken as true, a cause of action was set out. Civil Code, § 2279. Not only negligence, but gross negligence, is alleged. The demurrer, being general and not special, does not raise the direct question as to the measure of damages, or the extent to which there may be a recovery, if one is had. We will, therefore, not discuss the measure of damages further than to say that this case does not fall within the ruling in *Chapman v. Western Union Telegraph Co.*, 88 Ga. 762, where it was sought to recover from a telegraph company damages on account of mental pain and suffering alone, alleged to have resulted to the plaintiff from failure of the company to deliver a message in due time. Here the action is for a tort, and there is an allegation of actual pecuniary damage to the coffin and shroud, and of injury to the body. So that, as to this point, the case is quite similar to those of *Meagher v. Driscoll*, 99 Mass. supra, and *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, supra.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

McKENZIE v. MITCHELL.

1. Expenses of litigation are not recoverable by the plaintiff in an action for damages for the mere breach of a contract, when it does not appear that such contract was entered into by the defendant in bad faith, or procured by him by fraud or deceit.
2. By a timely special demurrer, a defendant is entitled to the benefit of an itemized statement of damages claimed by the plaintiff in a lump sum, when it appears from the plaintiff's allegations in reference thereto that the sum claimed is made up of distinct and separate items.
3. "Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages."
4. It is not error to refuse to charge the law applicable to a contention of a party, when there is no evidence to support such contention.

Argued April 15,—Decided May 15, 1905.

Action on contract. Before Judge Gober. Cobb superior court. September 28, 1904.

D. W. Blair, for plaintiff in error.

Napier, Wright & Cox and *J. E. Mozley*, contra.

FISH, P. J. Mitchell brought an action against McKenzie for damages. The substance of the petition, so far as material to the questions presented for our consideration, was as follows: On June 12, 1901, McKenzie addressed the following letter to Mitchell: "Dear Sir: You having made settlement with the Marietta Guano Company this date, damage claim for \$150, and believing firmly that you were not entitled to anything, I hereby make you the following proposition, namely: that we arrange with Judge Russell, of Winder, Ga., to name a day that will be satisfactory with both of us to meet with him; you to present to him your contract, and letters, and introduce such witnesses as you desire to show wherein you have been damaged by the Marietta Guano Company; I to have the right to introduce the contract which you made with the Marietta Guano Company, or any letters that you may have written to them, or any witness that I think is relative to the case, to show that the Marietta Guano Company has not violated contract with you and subjected themselves to damages. And if Judge Russell decides under the evidence that you were entitled to more than \$150, and whatever that amount should appear to be, I hereby agree to pay you 50% of said sum, and in consideration of said settlement above stated, I assume the

said 50% of all damages claimed by you, and agree to raise no issue in said case except the question of direct liability between yourself and the Marietta Guano Company. W. M. McKenzie."

On the same day, this proposition was accepted in writing by Mitchell, the acceptance being written upon the letter and immediately below McKenzie's signature. McKenzie was the president of the Marietta Guano Company and a stockholder thereof. The foregoing agreement was made for the purpose of relieving the Guano Company from any further liability to Mitchell, and when it was made he did so relieve it. McKenzie, at the time this agreement was entered into, as president of the company, paid to Mitchell the \$150 by giving him credit for that much on Mitchell's promissory note held by the company. In pursuance of the agreement, a day was set, at Winder, for the hearing of the matter submitted to Judge Russell. McKenzie had notice of the time of such hearing, but failed to appear. Another day was subsequently set for the hearing of the matter at Monroe, of which McKenzie was duly notified, and he again failed to appear. The 11th paragraph of the petition alleged: "That said W. M. McKenzie has acted in bad faith with your petitioner in declining to carry out his agreement of June 12, 1901, and thereby causing your petitioner the trouble of twice getting ready for said hearing, and caused him to go to Atlanta three times for the purpose of getting said McKenzie to a hearing, as agreed to by him, all to the damage of your petitioner in the sum of \$20." The 12th paragraph was as follows: "That said McKenzie has acted in bad faith with your petitioner, and is stubbornly litigious, and has caused petitioner unnecessary trouble, expense, and delay; that he has compelled him to employ counsel to bring this suit to recover his damages, and a reasonable attorney's fee in this case is \$100; that petitioner's other expenses in attending the trial of this case and in getting ready for trial is \$25." The defendant demurred to the 11th paragraph, "upon the ground that the allegations therein made do not entitle the plaintiff to the recovery of any sum under said paragraph; and upon the further ground that there are no items of loss or damage alleged therein." The 12th paragraph was demurred to upon the ground "that the allegations made in said paragraph do not authorize the recovery of any sum from defendant for counsel fees, expenses of attending trial, and in

getting ready for trial." The petition was then amended, the second paragraph of the amendment being as follows: "That in addition to the \$20 set out as having been expended by plaintiff in preparing for the hearing of said arbitration as stated in par. 11 of the original petition, he has expended the further sum of \$90.60 in getting ready for said arbitration, which defendant induced him to agree to, to wit: for his attorney's fee in attending hearing set at Winder by Judge Russell, \$10; for expenses of said attorney in going to Winder and Atlanta, \$20; for plaintiff's time lost in going to Winder and Atlanta, procuring testimony, etc., 13 days at \$2 per day, \$26; for amount expended for horse and buggy, 6 days at \$2 per day, \$12; for amounts expended in railroad fare from Monroe to Atlanta and from Monroe to Winder and return, 3 trips to Atlanta and one to Winder, and one trip Monroe to Bethlehem and return, \$12.60; for amount expended for hotel bills at Winder and Atlanta on said trips, \$3.75; for amounts paid for telephone and telegram, 75c.; and amounts paid witnesses' expenses for time lost, \$6.50; a total of ninety dollars and 60 cents." The third paragraph of the amendment made these allegations: "That on account of having to make a second trip to Marietta to attend the trial of said case, which was continued by defendant, plaintiff will have to expend \$20 in addition to the \$25 named in paragraph 12 of the original petition, and asks \$100 as reasonable attorney's fees as set [out] in said paragraph (\$50 of which plaintiff has already had to expend), making a total damage and expenditure which plaintiff has been subjected to, in preparing for said arbitration and in suing for defendant's breach of contract to submit to same, of two hundred and thirty-five and 60/100 dollars (235.60)." The second paragraph of the amendment was demurred to as follows: upon the ground "that it does not appear that any of said items were necessarily incurred in the preparation of said case for arbitration. Defendant demurs to all items charged as having been incurred at Winder, Atlanta, and Bethlehem, as being unnecessary, and should not be charged against defendant." The third paragraph was demurred to on the ground that defendant was not liable for any of the matters therein alleged. All of these demurrers were overruled, and the defendant excepted. The case proceeded to trial, and a verdict was rendered in behalf of the plaintiff for

\$235.60, which included all of the items claimed by plaintiff in the 11th and 12th paragraphs of the petition as amended. The defendant excepted to the overruling of his motion for a new trial, and in the bill of exceptions assigned error upon the overruling of the demurrers to the petition.

1. Mitchell's attorney's fees for bringing the present action and his expenses in attending court thereon were clearly not recoverable, and the demurrer to the items embracing such attorney's fees and expenses should have been sustained. *Edwards v. Kellogg*, 121 Ga. 373; *Traders Insurance Co. v. Mann*, 118 Ga. 381. In the case last cited it was held that the right to recover expenses of litigation in actions ex contractu "must be because of fraud, deceit, breach of trust, wilful misappropriation of funds, or fraud in securing a contract, or property thereunder. For expenses of litigation are not allowed for bad faith in refusing to pay, but where he 'has acted in bad faith' in the transaction and dealings out of which the cause of action arose." And again " . . . if the original contract was made in good faith, if there is an ordinary breach, if the cause of action itself is not colored or poisoned by bad faith on the part of the defendant, he will not be mulcted with additional damages because he refuses to pay."

2. The special demurrer to the item of \$20, set out in the 11th paragraph of the original petition, should have been sustained, as the defendant was entitled to an itemized statement of the amounts going to make up the \$20. The amendment to this paragraph of the petition did not furnish the defendant with any further information as to the \$20 claimed in the original petition. Nor do we think the expenses of Mitchell and his attorney in voluntarily going to Atlanta to induce McKenzie to comply with his agreement as to the submission were recoverable. *Traders Ins. Co. v. Mann*, supra; *Lampkin v. Garwood*, 122 Ga. 407.

3. The necessary expenses which Mitchell incurred in preparing for the hearings at Winder and Monroe were recoverable, if McKenzie arbitrarily or without sufficient cause failed to appear thereat. Of course this was a question for the jury, under the evidence. "Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages." Civil Code, § 3806. And damages are recoverable for a breach of contract when they arise naturally and according

to the usual course of things from such breach, and are such as the parties contemplated when the contract was made as the result of its breach. Civil Code, § 3799. The parties to the agreement of submission in the present case could fairly be said to have contemplated that they would each necessarily go to the expense of attending the hearings, of employing counsel to represent them at such hearings, and of securing the attendance of their witnesses. While some of the charges for expenses set out in the amendment to the 11th paragraph of the petition were not sufficiently itemized, there was no demurrer on this ground. The court, therefore, did not err in overruling the demurrer to the amendment to this paragraph.

4. What we have said above disposes of all of the grounds of the motion for a new trial, except those relating to the refusal of the court to charge in reference to the contention of the defendant that the agreement to submit the matter to the decision of Judge Russell was without consideration. There was nothing in evidence which tended to sustain such a contention, and there was, therefore, no error in declining to charge the jury thereon, even if the written requests were otherwise unobjectionable. The agreement itself showed a valid and sufficient consideration, to wit, the settlement of Mitchell's claim for damages against the Marietta Guano Company at and for the sum of \$150, and in the writing McKenzie expressly declared that, "in consideration of said settlement above stated," he assumed fifty per cent. of all damages found by Judge Russell in Mitchell's favor, in the event such damages should exceed \$150. The evidence showed that the claim of Mitchell against the Marietta Guano Company had been settled in accordance with the agreement, by McKenzie, as the president of such company, crediting Mitchell with \$150 on a note given by him to the company, and Mitchell receipting the company in full for such claim. There was no evidence tending to show that the agreement was without consideration, or that the consideration was otherwise than as expressed therein.

Judgment reversed. All the Justices concur, except Candler, J., absent.

SMITH v. ANDERSON.

Cobb, J. This being the first grant of a new trial, and an examination of the record disclosing that the verdict was not demanded by the law and the evidence, the judgment is

Affirmed. All the Justices concur, except Candler, J., absent.

Argued April 15,—Decided May 15, 1905.

Equitable petition. Before Judge Fite. Cobb superior court. December 17, 1904.

J. J. Northcutt and E. P. Green, for plaintiff in error.

H. B. Moss, contra.

WESTERN AND ATLANTIC RAILROAD CO. v. BRYANT.

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The allegations of fact upon which the plaintiff relied as showing that the defendant railroad company was liable to him in damages because of personal injuries sustained by him while in its employ and in the discharge of his duties disclosed that the negligent acts of which he complained were the proximate cause of his injury, and that he did not voluntarily expose himself to a known and obvious danger which was impending and which he should have taken immediate steps to avoid, instead of obeying the orders of the company's foreman, to whose directions he was subject.

Argued April 19,—Decided May 15, 1905.

Action for damages. Before Judge Fite. Whitfield superior court. November 14, 1904.

The question presented for determination in this case is whether or not the court below erred in overruling a demurrer interposed by the defendant railroad company to the plaintiff's petition as amended. The facts alleged were substantially as follows: On February 15, 1904, the plaintiff, J. T. Bryant, was employed by the company to work under one of its foremen, McFarland, on push and lever cars, and to do track work about two miles south of Dalton, the plaintiff being one of a crew working under McFarland on a section which extended from Dalton to a point some six miles below that place. On the date named the plaintiff was working with a squad of hands between Loughridge and Dalton, and was making use of the push and lever cars. Before these cars were started from Loughridge crossing, the foreman had sent one of the crew towards Dalton for the purpose of flagging any train of the defend-

ant company which might be approaching from Dalton. This member of the crew flagged a freight-train at Dalton and notified the engineer to look out for McFarland's push and lever cars, informing the engineer that these cars were moving towards Dalton, and stating about where they would be found. The servants of the company in charge of the train nevertheless ran the freight-train at a rapid rate of speed toward the point where the push and lever cars were being used; the foreman, hearing the train approaching, directed the plaintiff and the other members of the crew to reverse the direction of the push and lever cars and to push them in the opposite direction; plaintiff obeyed this order and undertook, with the other hands, to push the cars southward, and was in the act of doing so when the foreman, finding that the freight-train continued to approach at a rapid rate of speed, warned the crew to leave the push and lever cars and get out of the way of the rapidly approaching train. A track of the Southern Railway Company ran alongside of the track of the defendant, only a few feet distant. The plaintiff, "in the exercise of all care, when warned by his foreman to leave said push and lever cars, sought to escape from the approaching collision between said push and lever cars and said approaching freight-engine and endeavor to get away. . . The collision between the approaching freight-train and said push and lever cars was calculated to throw said cars or fragments of the same some distance from the track, and for [plaintiff] to reach a point of safety it was necessary for him to cross the track of the Southern Railway Company.' . . The negligence of the agents of the defendant in disregarding the flag and bringing their freight-train at a rapid rate of speed toward said push and lever cars placed the property of the defendant company and the lives of its employees in great danger, and [plaintiff] was discharging his duty in obedience to the orders of his foreman when he sought, with the balance of the crew, to push said push and lever cars away from said approaching freight-train, so as to give an additional opportunity for the same to be checked before it struck said cars. . . When engaged in this work, [plaintiff's] entire attention was absorbed in said work, and he was compelled to occupy a bent position, so that he had no view of the track in front of him, and his back was towards the freight-train approaching on the line of the defendant. . . When [he] and the other employees upon said push

and lever cars received their notice warning them to get out of the way of the approaching freight-train, in the exercise of all care he endeavored to escape from the emergency brought upon him by the negligent conduct of the employees of the defendant;" he at the time had no knowledge of "the approach of the train upon the Southern Railway, and no time for stopping or looking when he was warned to escape from the approaching freight-train;" and he "used all care in his efforts to escape, but was struck by an engine on the Southern Railway, which had approached at a rate of speed of not less than sixty miles an hour." Plaintiff had no warning of the approach of this train, and the noise of the freight-train prevented him from hearing its approach. He was free from fault; the defendant was negligent in that said freight-train ran down at a rapid rate of speed upon the push and lever cars with which he was at work; and the defendant was also negligent in that the foreman, under whose orders he undertook, with the other members of the crew, to push the cars away from the approaching freight-train, did not at an earlier time warn him of the close approach of the freight-train, and in that the foreman did not also warn him of the approach of the train on the Southern Railway, all of which negligence contributed to and caused the injuries sustained by him. He was knocked down, his left arm was broken and had to be amputated an inch below the elbow joint, three ribs were broken, his right lung was punctured, and he received other bodily injuries. He was twenty-four years old, was earning one dollar per day, and at the time he was injured was in the discharge of his duties under his employment by the defendant company. The freight-train struck the push and lever cars, knocking them about sixty feet, the collision taking place a few moments after plaintiff was struck by the Southern Railway engine. "It was the duty of defendant's foreman to watch over and supervise plaintiff and other employees working under the said foreman, and to warn them of the approach of said freight-train in time for them to reach a place of safety in case said freight-train did not stop. It was also the duty of said foreman to warn those under him, who were moving said push and lever cars under his direction, of any other danger which surrounded them. Defendant's foreman was aware of the position which plaintiff necessarily occupied while performing the duties required of him, and was aware of the fact that

plaintiff could not see the freight-train of defendant approaching him from behind, or the train of the Southern Railway Company approaching him from the front; the duty was upon defendant's foreman to notify plaintiff to leave the push and lever cars under circumstances and at a place where it was reasonably safe for him to do so." "The defendant was negligent in that its foreman for the first time notified plaintiff to leave the push and lever cars at a place and under circumstances that were dangerous, and which caused the plaintiff's injuries without negligence on the part of plaintiff contributing thereto."

Besides demurring to the petition generally, the railroad company specially demurred thereto on the following grounds: "1st. It is therein shown that the plaintiff, after being apprised of danger in which he was placed by the alleged negligence of the defendant's servants, and after having sufficient time and opportunity to free himself therefrom and place himself in a safe place, continued in a dangerous position brought about by the alleged negligence of defendant's servant, and declined to escape therefrom. 2d. It is shown by plaintiff's petition that his injury was not the proximate result of defendant's alleged negligence, but was caused by an independent third party, to wit, the engine controlled and operated on the tracks of the Southern Railway Company by the employees of said Southern Railway Company, and not controlled or operated directly or indirectly by this defendant or any of its employees, and was not caused by any act of any servant of this defendant, nor was any act of this defendant or any of its employees the proximate cause of plaintiff's injuries."

Payne & Tye and R. J. & J. McCamy, for plaintiff in error.

Hoke Smith, H. C. Peeples, W. C. Martin, and Marion Smith, contra.

EVANS, J. (After stating the facts.) That the employees of the defendant railroad company were guilty of acts of negligence is not controverted; it is insisted that such acts were not the proximate cause of the injury. What are the facts alleged bearing on this question? Assuming, for the present, that the plaintiff was not guilty of contributory negligence, it appears, (1) that the negligence of the defendant's train crew in approaching at a rapid rate the cars being operated by the section gang, notwithstanding

notice of its whereabouts had previously been given to the engineer, brought about the necessity of reversing these cars and pushing them southward in order to endeavor to prevent a collision; (2) the continuing negligence of the train crew in not checking the speed of the train rendered this precautionary measure of no avail; (3) the section foreman, instead of warning his crew that the train continued to approach rapidly and giving his men an opportunity to reach a place of safety, hazarded their lives by persisting in his effort to prevent the impending collision; (4) he knew of the position occupied by the plaintiff and that the plaintiff could not observe for himself the increasing danger in his rear, or observe the new danger in front presented by the approach of a train on the Southern Railway track, yet the foreman gave to the plaintiff no hint of this new danger, nor warned him in time to leave his post of duty after the danger from behind had become imminent; (5) when the foreman did give his tardy warning, the only avenue of escape from the immediate and pressing danger in the rear, which was open to the plaintiff, lay across the track of the Southern Railway Company; (6) knowing only of the impending collision, and having been unable to either see or hear the train of the Southern Railway Company, the plaintiff undertook to save himself by availing himself of his only apparent avenue of escape, which was immediately cut off by the rapidly moving train approaching on the track of that company. To place one in a situation where he will be instantly killed if he remains where he is, and to thus force him to throw himself into the very teeth of an unknown peril in a futile effort to escape injury, is a very practical way of furnishing the efficient and proximate cause of his being physically injured by the physical operation of the unknown peril into which he is driven. Not only does the plaintiff allege that he was negligently placed in such a situation, but he goes further and asserts that his lack of knowledge of the unknown peril to which he was exposed was due to the negligent omission of the foreman to give him notice thereof before he was actually entrapped between a known and an unknown peril, both of which threatened his life.

As was pertinently remarked by Lord Ellenborough in *Jones v. Boyce*, 1 Stark. 493, one who places a man "in such a situation that he must adopt a perilous alternative is responsible for

all the consequences." Since the decision in that case, which has been approved and universally followed in this country, the defense that one negligently placed in such a situation was actually hurt, not by the person who placed him in peril, but by his own act in endeavoring to escape therefrom, whereby he came into contact with another, independent, and overwhelming agency, of which he was unable to gain the mastery, has lost all novelty. See cases cited in note to *Gilson v. Delaware Canal Co.*, 36 Am. St. Rep. 847-848. "It is well settled that the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability; that is to say, the plaintiff's injuries may yet be the natural and proximate in law, although between the defendant's negligence and the injuries other causes, conditions, or agencies have operated." 21 Am. & Eng. Enc. L. 490. The "causal connection must be actually broken, the sequence interrupted, in order to relieve the defendant from responsibility. The mere fact that another person concurs or co-operates in producing the injury or contributes thereto, in any degree, whether large or small, is of no importance." 1 Shear. & Redf. Negl. § 31; see also *Missouri Ry. Co. v. Rogers*, 40 S. W. 956; *Lundeen v. Electric Light Co.*, 41 Pac. 995. "If one person wrongfully places another in a position of peril, whereby the latter makes a natural and reasonable effort to escape the threatened danger, the former is responsible for the consequences of such effort, precisely as if he had immediately caused them." *Watson*, Dam. Per. Inj. § 66. This doctrine was applied by this court in *Simmons v. Railway Co.*, 92 Ga. 658. The plaintiff, a brakeman employed by the defendant company, was put in imminent peril by the negligence of its engineer in not stopping at a switch in order that a train coming from the opposite direction might pass; a collision between the two trains was momentarily expected; the plaintiff and the conductor vainly endeavored to signal the engineer with their lanterns, but the lights went out, and the conductor ordered the plaintiff to run forward and tell the engineer to stop his train. In attempting to execute this order, the plaintiff, while passing over a coal-car, lost his footing and fell, sustaining injuries. The defense of the defendant company was that the negligence of its engineer was not the proximate cause of these injuries, which re-

sulted from a large lump of coal over which the plaintiff fell; but our present Chief Justice effectively disposed of this contention by saying that the company wrongfully placed the plaintiff in a situation of peril, giving him no alternative save to jump from the moving train or endeavor, as he did, to stop it in time to avoid the expected collision; had he jumped and struck the lump of coal or any other object on the ground, any injury so sustained would result from the act of negligence charged, and the fact that he was injured while jumping from one part of the train to another in an effort to effect his escape from the danger by procuring the engineer to stop the train, did not make such negligence any the less the proximate cause of his injury. A wrong-doer can not avail himself of the plea that he only produced the fright which caused another to injure himself in an attempt to guard himself from the threatened danger. *Ellick v. Wilson*, 79 N. W. 152; *San Antonio Ry. Co. v. Peterson*, 49 S. W. 924. It may, in the present case, be conceded that the foreman of the defendant company was not negligent in not anticipating that a train of the Southern Railway Company might come along and cut off the plaintiff's only avenue of escape from the impending danger in his rear. Still, as the foreman failed to give warning till immediate flight therefrom was rendered imperative and the plaintiff was thus put in peril of his life, the company would be liable if there had been no approaching train on the parallel railroad track and the plaintiff had been injured by falling in his precipitate haste in endeavoring to cross the track and reach a point of safety. The foreman might well have foreseen that if the plaintiff was forced to make undue haste in an effort to get out of his perilous situation, he might be injured in various ways. "Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." *Atchison Ry. Co. v. Parry*, 31 Am. & Eng. R. Cas. 215; *Mayor of Macon v. Dykes*, 103 Ga. 848. Any injury which ordinary prudence would suggest as likely to result from the act of negligence committed would be the proximate result of such negligence. *Township v. Graver*, 125 Pa. St. 24; *Johnson v. Tel. Exchange Co.*, 48 Minn. 433. The test is not whether the foreman could

reasonably have anticipated that the plaintiff would be run over by a train on the parallel track, but whether the foreman should have foreseen that if timely warning was not given to the plaintiff to leave his post of duty, he might be subjected to injury, not only from the obvious danger of the impending collision, but from other wholly independent, but existing, sources of danger. 1 Shear. & Redf. Negl. § 29. Thus, in *W. & A. R. Co. v. Bailey*, 105 Ga. 100, while it could not reasonably be expected of the company's engineer to anticipate that if he recklessly ran over a trespasser on the track, the trespasser's body would be hurled against another employee of the company who was at his post of duty, the company was held liable for injuries in this manner sustained by such employee.

We are by no means prepared to say, however, that the precise injury sustained by the plaintiff in the present case was not one which might have been anticipated. The parallel track of the Southern Railway Company represented something more than a feature of the landscape at the point where the plaintiff was run over; the company was engaged in the serious business of transporting freight and passengers, and employed the customary means used in conducting such a business; trains ran, and were to be expected to run on that railroad. Long since, this court called attention to the fact that the employees of a company so engaged were in a position to realize that trains might be run along the track at any and all times; and in *Southern Ry. Co. v. Webb*, 116 Ga. 152, 157, Mr. Justice Cobb said: "If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such person from an engine of another company which the first company knew had a right to and did actually use the tracks from time to time? It would indeed bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it." The result reached in that case was that the negligence of the defendant, which caused the plaintiff's son to be thrown off a train onto its track, where he lay insensible till a train of another company came along and ran over him, was the proximate cause of his death, the

crew of that train being blameless. Had the plaintiff in this case been hurt by a train northward bound on the defendant company's track, the approach of which the foreman failed to observe, though he kept his men pushing the cars towards it, the company would surely not be in a position to say that common foresight could not have suggested the possibility of there being such a train, and therefore its foreman was under no duty to maintain a lookout in the direction from which it came. And it seems none the less reasonable to conclude that the probability of the Southern Railway Company using its parallel track for the purpose of conducting its business in usual course and with customary means was a probability which human foresight might have suggested to a man of ordinary care and prudence.

The allegations of the petition do not show that the plaintiff voluntarily exposed himself to a known and obvious danger which was impending at the time he obeyed the order of the foreman to reverse the push and lever cars and propel them in the opposite direction from that in which they had been moving. The fair inference from the facts recited is, that the foreman and the men working under his direction pursued a safe course in so doing, acting upon the reasonable assumption that the crew of the freight-train would take all necessary steps to reduce the speed of the train. According to the allegations of the petition, the plaintiff would have committed a breach of his duty had he refused to obey this order of the foreman, and it was not until afterwards, when it became apparent that the trainmen were not checking the speed of the approaching train, that it was proper and necessary that the men in charge of the push and lever cars should abandon them to their fate and seek a place of safety for themselves. Nor, under the facts alleged, was the plaintiff chargeable with fault because he did not forsake his post of duty at the appropriate moment, but relied on the foreman to give him timely warning.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

123	86
129	716

WRIGHT v. HORNE.

In an action in the superior court on a promissory note containing a waiver of homestead and exemption, the petition may be amended by alleging, that prior to the institution of the suit the defendant was adjudged a bankrupt, that certain property has been set apart to him as an exemption by the trustee in bankruptcy, and that the plaintiff has not proved his debt in the court of bankruptcy; and by praying for a special judgment against such exempted property.

Argued April 20, — Decided May 15, 1905.

Complaint. Before Judge Fite. Whitfield superior court. October 11, 1904.

W. H. Odell and *W. E. Mann*, for plaintiff in error.

J. M. Rudolph and *W. C. Martin*, contra.

FISH, P. J. On March 14, 1904, M. K. Horne brought an action against T. A. Wright, returnable to the April term thereafter of Whitfield superior court, on two promissory notes given by defendant to plaintiff, dated December 9, 1902, and due respectively December 15 and January 15 after date. The petition was framed in accordance with the form prescribed in section 3391 of the Code of 1882, except that it was paragraphed and alleged that the notes contained a waiver by the defendant of the right to avail himself of the benefit of homestead and exemption laws of this State, and that the plaintiff had served the defendant with the notice prescribed by the statute for the collection of attorney's fees. Defendant filed pleas of partial payment and set-off. At the October term, the defendant moved to dismiss the case, on the ground "that the court had no jurisdiction of the party and subject-matter, it being admitted that the defendant had been adjudicated a bankrupt on the . . . day of October, 1903, under the act of Congress relating to bankruptcy." Plaintiff then offered an amendment to his petition, to the effect that the defendant was adjudicated a bankrupt in October, 1903, and that subsequently an exemption under the laws of this State was set apart to him in specified property by the trustee in bankruptcy; and that plaintiff had never proved his debt evidenced by the notes in the court of bankruptcy. The amendment prayed for a judgment in rem against the exempted property. Defendant objected to the allowance of the amendment, on the following

grounds: "1st. Because there was no suit in court of which the superior court of Whitfield county had jurisdiction of the person or subject-matter, and therefore nothing to amend by. 2d. It was an effort to convert a suit at common law into an equitable action. 3d. It undertook to convert an action in personam into an action in rem, and added a new cause of action." The amendment was allowed over the objections, and the motion to dismiss the case was overruled. The case proceeded to trial, and a verdict was rendered for the plaintiff, after allowing defendant a portion of his counter-claim, the amount of the verdict to be made out of the exempted property; and a judgment was entered accordingly. Defendant excepted to the allowance of the amendment, to the refusal to dismiss the case, and to the judgment rendered.

The practice in this State as to the allowance of amendments is very liberal. "All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by." Civil Code, § 5097. "A petition showing a plaintiff and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment." Civil Code, § 5098. The provisions of the code for granting appropriate relief in all civil cases are equally comprehensive. "The superior courts of this State, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, and apply on such trial remedies or relief, legal or equitable, or both, in favor of either party, such as the nature of the case may allow or require." Civil Code, § 4833. "Any person desiring to obtain equitable relief in the superior court may, in a separate suit for that purpose, or in connection with a suit claiming only such remedies or relief as is administered in courts of common law, claim equitable relief by appropriate and suffi-

cient pleadings, and obtain the equitable relief proper in the case." Civil Code, § 4834. "Any person claiming equitable relief may make all necessary parties to secure equitable relief, either at the beginning of his suit, or afterwards by amendment; and may make amendments in matter of form or substance." Civil Code, § 4835.

The original petition showed a plaintiff and a defendant, alleged that the latter resided in Whitfield county, and sufficiently indicated and specified the two notes which defendant had given plaintiff, containing a waiver of homestead and exemption, and which were past due and unpaid, as the cause of action upon which the suit was based. It is clear, therefore, that the petition stated a cause of action and showed that the court to which the suit was brought had jurisdiction both of the defendant and the subject-matter of the action. It is equally obvious that it contained enough to amend by and to authorize all germane amendments. While the petition alleged that the defendant had waived his right to avail himself of the homestead and exemption laws of the State, as against the notes sued on, it failed to allege that the defendant had been adjudged a bankrupt and that an exemption in specified property had been set apart to him, under the laws of the State, by the trustee in bankruptcy. The allegation of such waiver indicated plaintiff's intention to rely upon and to enforce whatever right it gave him to subject defendant's property to the payment of the notes. The fact that defendant had been adjudged a bankrupt placed all his estate in the jurisdiction of the court of bankruptcy, to be there administered, so that none of it could be subjected to any judgment plaintiff might recover on the notes against the defendant bankrupt, except so much of it as was set apart to him by the trustee as an exemption. The title to such exempted property remained in the bankrupt defendant and never passed to the trustee, and after it was set apart the court of bankruptcy had no power to administer it. *Lockwood v. Exchange Bank*, 190 U. S. 294. The plaintiff, therefore, by reason of the defendant's waiver of the benefit of exemption, had the right to subject the property set apart as an exemption by the trustee, provided a judgment for that purpose could be obtained before the defendant was discharged in bankruptcy. In order that he might recover such a judgment, plaintiff offered the amendment to his

petition. The suit was in the superior court, which, as we have seen, the statute declares shall, on the trial of any civil cause, give effect to all the rights of the parties, legal or equitable or both, and apply such remedies, legal or equitable or both, as the nature of the case may allow or require, and in which a party desiring to obtain equitable relief in connection with a suit claiming only such remedy or relief as is administered in courts of common law may claim and obtain such equitable relief as is proper in the case, by appropriate and sufficient pleadings, and, for such purpose, may make all necessary and appropriate amendments, both in matter and form. In view of these provisions of our code, we are of opinion that there was no merit in the objections to the amendment, based on the grounds, that it sought to convert a suit at law into one in equity, and an action in personam into one in rem, and that it added a new and distinct cause of action to the petition. "Relatively to the law of pleading, a cause of action is some particular legal duty of the defendant to the plaintiff, together with some definite breach of that duty which occasions loss or damage;" or, from the standpoint of rights, "Relatively to the law of pleading, a cause of action is some particular legal right of the plaintiff against the defendant, together with some definite violation thereof which occasions loss or damage." *Ellison v. Georgia Railroad Co.*, 87 Ga. 699, 670; *City of Columbus v. Anglin*, 120 Ga. 785. See also *Western & Atl. R. Co. v. Burnham*, ante, 28. The cause of action set out in the petition in the present case was the duty of the defendant to pay the plaintiff the amount due on the notes set out in the petition in accordance with their tenor, together with a breach of that duty by the defendant, by his failure to pay the notes when due, and the resulting damage to the plaintiff. The amendment did not change this cause of action. It merely set forth additional facts going to show that, notwithstanding the defendant had been adjudged a bankrupt, there was certain property of his which, owing to its having been set apart, under the laws of this State, to him, by the trustee in bankruptcy, as an exemption, was beyond the jurisdiction of the bankrupt court, and which, by virtue of the waiver of homestead and exemption contained in the notes sued on, and the fact that the plaintiff had not proved the debt in the bankrupt court, was subject to the payment of the plaintiff's claim, under a proper judg-

ment; and prayed, in view of the additional facts alleged, for such a judgment so subjecting this particular property. It seems to us obvious that the amendment did not set forth a new and distinct cause of action, but merely sought a different judgment upon the same cause of action.

Counsel for plaintiff in error cited *Long v. Bullard*, 59 Ga. 355, wherein it was held: "Complaint upon a promissory note, in the statutory form, can not be amended by adding count setting up that plaintiff held title to certain property as security for the payment of the debt sued on, and therefore praying that such property might be sold, the note sued on paid out of the proceeds, and the surplus turned over to defendants. The cause of action thus set up is new, and a new judgment is prayed." Also *Broach v. Kelly*, 66 Ga. 148, wherein a similar ruling was made. It is sufficient to say that those decisions were rendered prior to the passage of the acts of 1885 and 1887, the provisions of which are codified in sections 4834, 4835, and 4833 of the Civil Code, which we have quoted, and prior also to the adoption of section 5098. *Bell v. Dawson Grocery Co.*, 120 Ga. 628, and *Hudson v. Lamar Drug Co.*, 121 Ga. 835, were also cited by counsel for plaintiff in error. It was held in these cases, that pending the bankruptcy proceedings the holder of a note containing a waiver of homestead has no remedy at law, but must enforce his rights arising from the waiver in a court of equity. The latter case was brought in a city court, which had no equitable jurisdiction, and in the former case it was held, in effect, that under the facts an equitable petition for receiver, etc., could be maintained, because the petitioner had no adequate remedy at law. The question of amendment was not involved in either of the cases. As the amendment in the present case was properly allowed, the court rightly overruled the motion to dismiss the case.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

SOUTHERN RAILWAY COMPANY v. CUNNINGHAM.

1. Where suit was brought in this State on account of a personal injury occurring in the State of Alabama, and no statute of that State was pleaded or shown, this court will presume that the common law was of force there.

2. At common law common carriers of passengers were bound to use extraordinary diligence; and injury to a passenger in consequence of the breaking or failure of a vehicle, roadway, or other appliances of the carrier, owned or controlled by it and used by it in the transit, or the manner of their operation, raised a presumption of negligence against it.
3. A common carrier of passengers is bound to use extraordinary diligence, no matter what means of conveyance may be employed, whether a passenger-train, a freight-train, or a "mixed" train. The standard or degree of diligence required is the same, namely, that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances. But the acts which extraordinary diligence requires to be done are not the same under all circumstances.
4. Extraordinary diligence, as applied to the movement, starting, or stopping of "mixed" trains, and the jolts or jerks occurring in connection therewith, is that extreme care and caution which very prudent and thoughtful persons would use with a like train under like circumstances.
5. In determining whether extraordinary diligence has been used by the company, the nature and character of the train, whether a passenger-train, a freight-train, or a "mixed" train, is a circumstance for the consideration of the jury; and on request to charge the jury in regard to considering the character of the train, the presiding judge should not omit all reference thereto.
6. If a passenger, injured by a negligent jerk occurring in the operation of a railway train, by the exercise of ordinary care could have avoided the consequences to himself of the railroad company's negligence, he would not be entitled to recover. The character of the train and its method of operation, known to the plaintiff, are circumstances for the consideration of the jury in determining whether he exercised ordinary care or not. But a request to charge which would make the exercise of ordinary care on the part of a passenger dependent entirely on what was usual or customary with the railroad, without reference to his knowledge of it, or to the circumstances of the particular case, was properly refused.
7. If a passenger was injured by the negligence of the railroad company, he was bound to lessen the damages as far as practicable by the use of ordinary care and diligence. But it would be error to charge that it was his duty to do some particular thing for that purpose.
8. Grounds of a motion for new trial, based upon the refusal of the judge to allow certain questions to be asked, furnish no reason for reversal, where it does not appear what answers were expected thereto.

Argued April 20,—Decided May 15, 1905.

Action for damages. Before Judge Hamilton. City court of Floyd county. August 24, 1904.

Cunningham brought suit against the Southern Railway Company, seeking to recover for an injury to himself. He alleged, that he took passage upon a passenger-train of the defendant from a point in this State to a place in Alabama; that when the

train reached a station in Alabama it was pulled into a side-track to allow a train coming in the opposite direction to pass; that after going into the side-track, the conductor and other servants of the defendant announced that the train would stand there for half an hour; that plaintiff arose and walked along the aisle to a tank of drinking water which was located at the end of the car, and was kept there for the use of passengers; that while in the act of drinking, without notice, warning, or signal of any kind the car was moved suddenly and with great and unusual violence backward, and by said violent motion plaintiff was thrown to the floor and injured. The defendant denied the substantial allegations of negligence. It further pleaded, that the train on which the plaintiff was riding was a mixed train, composed partly of freight-cars and partly of passenger-cars; that this fact was known to plaintiff, and he assumed all risk incident to traveling on such a train; and that his injury, if any, was in consequence of the necessary movements of said train, which were carefully made, or of negligence on his part, or of unavoidable accident; also that no greater jolts or jars were made than are usual and necessary in handling such trains, and that the movements were such as were usual and necessary in doing so.

The jury found for the plaintiff. The defendant moved for a new trial. The motion was overruled, and it excepted.

Shumate & Maddox and *G. A. H. Harris & Son*, for plaintiff in error. *R. T. Fouché* and *M. B. Eubanks*, contra.

LUMPKIN, J. (After stating the facts.) 1, 2. Plaintiff in error insists that as the injury took place in the State of Alabama, and no statute of that State is pleaded or shown, the law of this State requiring extraordinary diligence from carriers of passengers did not apply; that such was not the rule at common law, and that no presumption of negligence arose from proof of injury. The injury having occurred in the State of Alabama, and no statute of that State having been pleaded or shown, the presumption is that the common law is of force there. *Selma R. Co. v. Lacy*, 43 Ga. 461. At common law, common carriers of freight were insurers, and no excuse availed them in cases of loss, unless it was occasioned by the act of God or the public enemies. In determining the status of carriers of passengers the courts distinguished their position from

that of common carriers, and held that they were not insurers of the safety of their passengers, but were liable for negligence causing injury. As to the measure of diligence required of them, various forms of expression were used. In some cases it was said that they were bound to exercise the highest degree of care and skill; in others, that they were answerable for the smallest negligence; in still others, for the least failure in duty; and various other forms of words were employed. A consideration of these decisions will show that the common-law courts required of a common carrier of passengers a degree of diligence which was fully equal to extraordinary diligence; and it has generally been held that they are bound to use extraordinary diligence. 2 Redfield on Railways (6 ed.), § 192 and notes; 1 Fetter on Carriers of Passengers, § 8, p. 13; Thompson on Carriers of Passengers, 200. On page 206 of the authority last cited, the author expresses the opinion that the modern English rule appears to be that carriers of passengers are only bound for the care and caution which may be reasonably expected to be used by reasonable men; reducing the standard to ordinary or reasonable care. But Mr. A. C. Freeman in an elaborate note to the case of *Ingalls v. Bills*, 43 Am. Dec. 355, 357, argues with great force that there has been no change in the English rule on the subject.

At the time of the adoption of the common law into this State, the authorities cited will show, extraordinary care was required on the part of common carriers of passengers, and it has been often held that proof of injury to a passenger in consequence of the breaking or failure of a vehicle, roadway, or other appliances owned or controlled by the carrier or used by it in making the transit, or the manner of their operation, raised a presumption of negligence against the carrier. This construction was placed upon the common law by the Supreme Court of this State, in *Central Railroad v. Freeman*, 75 Ga. 331, 338, and in *Augusta & Summerville R. Co. v. Randall*, 79 Ga. 304 (9), 314. In the latter case it is said (p. 314): "This presumption that, where the plaintiff has shown that he was a passenger and was hurt or damaged by the running of the railroad company's trains or machinery, the company was negligent, is a common-law presumption. It is no new thing because it was not enacted in this State until the act of 1855. It obtained at common law, and had been the law of Eng-

land and of this country all the time." It has been held that if there was a diversity in the decisions of different courts on this subject, the construction heretofore placed upon the common law by this court would prevail. *Pattillo v. Alexander*, 96 Ga. 60; *Krogg v. Atlanta and West Point Railroad*, 77 Ga. 202 (2). But contrast *Atlanta Ry. v. Tanner*, 68 Ga. 384 (3); *Anderson v. Walton*, 35 Ga. 205. See also *Tanner's executor v. L. & N. R. Co.*, 60 Ala. 621. In the case of *Savannah Ry. v. Williams*, 117 Ga. 420, however, Lamar, J., says, that the presumption as contained in the statute of this State is more extensive than it was at common law.

3-5. "The degree of diligence due from a common carrier [of passengers] to a passenger is extraordinary, no matter what means of conveyance may be employed." *Ball v. Mabry*, 91 Ga. 782; *Thompson on Carriers of Passengers*, § 20, p. 234; *I. & G. N. Ry. Co. v. Irvine*, 64 Tex. 529 (3); *Fetter on Carriers of Passengers*, § 16, p. 32; *Edgerton v. New York etc. Railroad*, 39 N. Y. 227; *Dunn v. Grand Trunk Ry. Co.*, 58 Maine, 187, 196; *Indianapolis R. Co. v. Beaver*, 41 Ind. 493; *Chicago & Alton R. Co. v. Flagg*, 43 Ill. 364; *Ohio & Miss. R. Co. v. Dickerson*, 59 Ind. 317; *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291, 296; *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9; *Schilling v. Winona etc. Railroad (Minn.)*, 68 N. W. 1083. Extraordinary diligence, as the term is defined and used in this State, means "that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances." *East Tenn., Va. & Ga. Ry. Co. v. Miller*, 95 Ga. 738; Civil Code, § 2899. The standard or degree of diligence required of a carrier of passengers with respect to a passenger is, therefore, extraordinary diligence. But what acts will meet this requirement must necessarily depend upon the circumstances of the particular case. See *Macon Street Ry. Co. v. Barnes*, 113 Ga. 218, 219. What extraordinary diligence in running a freight-train would require to be done may differ from what would be required in operating a passenger-train. Thus it has been held that a passenger who sees fit to travel on a freight-train takes the risk of the usual and necessary jolts properly incident to handling and running such trains. *Ball v. Mabry*, 91 Ga. 781 (4), *supra*; *Crine v. E. T. Ry. Co.*, 84 Ga. 651; *Central Railroad v. Smith*, 76 Ga. 209. A freight-train is primarily for

the carriage of freight. What is called a "mixed" or accommodation train is somewhat different. It is partly used for the transportation of freight, but also has a passenger car or cars attached to it, and is held out to the world as a regular means for transporting passengers. This does not change the rule announced above, that in all cases extraordinary diligence is required of a carrier of passengers. But in determining what acts were necessary to fulfil this measure of diligence in the particular case, and whether such diligence was used, the nature and character of the train, its known uses, and the necessary incidents of its operation are circumstances for the consideration of the jury. In *Chattanooga R. Co. v. Huggins*, 89 Ga. 495 (5), it was held, that "A railway company, in coupling a freight-train to a passenger-car having passengers already in it to be carried by the train, is bound to exercise extraordinary diligence,—that is, such diligence as very prudent persons would use with a like train under like circumstances." In *Macon R. Co. v. Moore*, 108 Ga. 84, 89, the rule in regard to mixed trains is thus announced: "A passenger who enters such a mixed train, with knowledge of its peculiar structure and movements, assumes the risks consequent upon its unavoidable jerks when starting; and the degree of diligence he should exercise should have reference to such necessary movements of the train. But he also has the right to rely on an exercise of extraordinary diligence by the railroad company in its management of the train in such a way as to avoid danger of injury to its passengers; and when he has used ordinary diligence for his own safety under the circumstances, the company is liable for damages to him resulting even from its slight neglect." Compare *Central R. Co. v. Summerford*, 87 Ga. 626, 630; *Oviatt v. Dakota C. Ry.*, 43 Minn. 300.

Some of the requests to charge in the case now under consideration were based upon the decision in *Crine v. Ry. Co.*, supra. They constituted only a part of the charges which were approved in that case, and omitted any reference to the necessity for the use of extraordinary diligence. Exception was taken, however, to the fact that the presiding judge gave no charge in respect to the character of the train, and its usual and necessary modes of operation, in submitting to the jury the question of whether or not the defendant used extraordinary diligence, although requested

to charge on that subject. His attention was called to it by the requests, and it was error to entirely disregard it.

6. The court instructed the jury, in effect, that if by the exercise of ordinary care the plaintiff could have avoided the consequences to himself of the defendant's negligence, he would not be entitled to recover. Ordinary care, as has been said above in regard to extraordinary care, may require one thing at one time and under one set of circumstances, and a different thing at another time and under different circumstances. One of the requests to charge was defective in that it made the question of what would be ordinary care on the part of the plaintiff dependent entirely upon the character of the train and the manner in which it was run, operated, and handled at stations where it was usual to receive and discharge freight. The character of the train and its method of operation, as known to the plaintiff, were circumstances for the consideration of the jury in determining whether he exercised ordinary care or not. But ordinary care is a matter affecting the individual who must use it, and it will not do to say that the standard of diligence on his part depends alone upon the character of the train, or what the usual mode of operating it is, without regard to his knowledge or whether the jerk was necessary or usual.

If the plaintiff was injured by the negligence of the defendant, he was bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Civil Code, § 3802. But it would have been error to charge the jury that it was his duty to do some particular thing for that purpose, or to say to them that if he could have "mitigated his suffering by having an operation performed, or other surgical treatment, and could have relieved himself partly or wholly from suffering, it was his duty to take such care." His duty was to use ordinary care and diligence to lessen the damages. But the court could not tell the jury what particular acts ordinary care would require him to do. On this subject compare *Watson on Damages for Personal Injuries*, § 189; *Blate v. Third Ave. R. R.*, 44 N. Y. S. C. App. Div. 163; *Collins v. City of Council Bluffs*, 32 Iowa, 324 (3).

8. The grounds of the motion for new trial which excepted to the refusal to permit certain questions to be asked of witnesses do not show what answers were expected or would have been given.

One of them, moreover, appears rather broadly to ask the witness Hilley to give an opinion whether what he did or what others did was unusual and unnecessary. Where, however, the declaration alleged that the jerk complained of was "with great and unusual violence," and this was denied by the answer, evidence on this subject was admissible. *Ball v. Mabry*, 91 Ga. 782 (4), supra; *City Electric Railway Co. v. Smith*, 121 Ga. 663.

Judgment reversed. All the Justices concur, except Candler, J., absent.

SIMS v. PRICE.

FISH, P. J. Distress for rent will lie only where the relation of landlord and tenant exists between the parties. *Cohen v. Broughton*, 54 Ga. 296; *Lathrop v. Standard Oil Co.*, 83 Ga. 307. Where the entry is under one holding adversely to another, the latter is not the landlord of the tenant. See Civil Code, § 3116.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Argued April 21.—Decided May 15, 1905.

Distress warrant. Before Judge Henry. Floyd superior court. September 9, 1904.

Henry Walker, for plaintiff. *M. B. Eubanks*, for defendant.

HENRY v. LEET.

FISH, P. J. The action was on a promissory note given by the defendant for the purchase-money of land. One of the pleas was that the plaintiff had failed to put the defendant in possession of a specified portion of the land, according to contract. The rental value of such portion was proved, and there was evidence for defendant tending to support this plea. *Held*, that it was error to direct a verdict for the plaintiff as against this plea.

Judgment reversed. All the Justices concur, except Candler, J., absent.

Argued April 22.—Decided May 15, 1905.

Complaint. Before Judge Henry. Chattooga superior court. January 5, 1905.

Eale & Shaw and *J. M. Bellah*, for plaintiff in error.

R. M. W. Glenn and *F. W. Copeland*, contra.

SIMS *v.* PRICE.

Under the act of December 21, 1897 (Acts 1897, p. 54, Van Epps' Code Supp. § 6225), notice of the filing of a traverse of the answer of a garnishee in a proceeding pending in a court other than a justice's court "shall be given in writing . . . at least ten days before the trial of such garnishment." Even if the court has any discretion to postpone the trial to permit notice to be given, it is not an abuse of discretion to refuse to do so, where more than five months elapsed between the filing of the traverse and the calling of the case for trial, and no reason is assigned for the failure to give the notice.

Argued April 21, — Decided May 15, 1905.

Garnishment. Before Judge Henry. Floyd superior court. January 26, 1905.

The answer of the garnishee was filed on July 26, 1904. On the paper on which the answer was written the plaintiff, on August 20, 1904, wrote and filed a traverse to the answer. On January 26, 1905, the case was called for trial, and the garnishee moved to dismiss the traverse, because notice of the filing of the traverse had not been served on him ten days before the trial. The plaintiff moved that the case be postponed or continued for the term, in order to give him time to serve the notice. The court dismissed the traverse and discharged the garnishee, and the plaintiff excepted.

Henry Walker, for plaintiff. *M. B. Eubanks*, contra.

COBB, J. The act of December 21, 1897, provides that notice of the filing of a traverse of the answer of a garnishee, in a proceeding in a court other than a justice's court, shall be given to the garnishee, if he be accessible, and if not, to his agent or attorney of record, at least "ten days before the trial of such garnishment." Acts 1897, p. 54, Van Epps' Code Supp. § 6225. Failure to give the notice under such circumstances renders the judgment void. When the garnishee is accessible, notice of the filing of the traverse is an indispensable prerequisite to give the court jurisdiction to try the issue made by the traverse. Even if the court has a discretion to grant a postponement that notice may be given, there was no abuse of discretion in the present case in refusing to do so. The plaintiff had more than five months in which to give the notice, and assigned no reason whatever for his

failure to do so. In the absence of a traverse, the answer of the garnishee was such as to authorize his discharge.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

BALE v. TODD *et al.*, executors.

1. When it appears that a plaintiff has been rightly nonsuited, and has not suffered by the refusal of the court to allow an amendment to his petition, setting up facts which, if shown on the trial, could not have affected the result, this court will not undertake to inquire whether the proffered amendment should or should not have been allowed.
2. Where a deed in express terms recites that the grantor conveys to the grantee only the right and privilege to use, in common with himself, a certain stairway for all necessary purposes, the expense of keeping the stairway in repair to be borne equally by them, the instrument is to be construed as conveying merely an easement, and not an undivided half interest in the stairway in fee, notwithstanding the deed contains a warranty of title and also the usual habendum clause appropriate to a conveyance intended to pass a fee-simple estate.
3. A deed purporting to have been executed by officers of a corporation, but to which no corporate seal is affixed, is not admissible in evidence as a conveyance of title from the corporation, in the absence of proof that the persons signing the deed in the name of the corporation were its officers and, as such, had authority to execute the conveyance.
4. Even if such a deed is, without such proof, admissible as color of title, the rejection of the instrument tendered in evidence in the present case was not prejudicial to the plaintiff, as its admission could not have saved her from a nonsuit.
5. The appropriate remedy for the disturbance of an easement is, not an action of trespass, but an action on the case, or, when such an action will not afford adequate relief to the aggrieved party, an equitable proceeding to enjoin interference with the enjoyment of the easement.

Argued April 22, — Decided May 15, 1905.

Equitable petition. Before Judge Henry. Floyd superior court. January 23, 1905.

*George A. H. Harris and Wesley Shropshire, for plaintiff.
Dean & Dean, for defendants.*

EVANS, J. The petition of Mrs. Naomi P. Bale set forth the following allegations of fact: L. A. and C. A. Todd are the duly appointed and qualified executors of I. L. Todd, deceased, and more than twelve months have elapsed since their qualification as such. Petitioner is the owner of a certain house and lot in the City of Rome, Ga., known as number 331 Broad street, and is also the

owner, as a part thereof and an appurtenance thereto, of a certain stairway on the side of her building next to which is located a storehouse occupied by L. G. Todd as a grocery store. The executors aforesaid have entered upon and taken possession of one foot and one inch of the north or upper side of this stairway, have sawed off and enclosed one foot and one inch of the width of the same, and have also taken possession of and closed up six and one half feet of the upper end of the stairway, thereby greatly lessening its width and length, to the great injury and damage of plaintiff. In so doing, they acted willfully, wrongfully, and without right or authority, to the damage of plaintiff in the sum of two hundred dollars. The trespass complained of was committed on August 12, 1902, and they are still in possession of the portion of the stairway wrongfully taken by them, and fail and refuse to deliver possession thereof to plaintiff. She prayed that she recover of the executors of Todd the damages sustained by reason of their trespass upon her property; that she have and recover possession of the portion of the stairway so wrongfully held by them, and that she have such other and further relief as the court might deem reasonable and just. Attached to her petition was an abstract of the title under which she claimed the premises therein mentioned as belonging to her. One of the conveyances included in this abstract was a deed from the Rainbow Steam Fire Engine Co. No. 1 to J. A. Bale, under whom she claimed, dated July 6, 1888. She subsequently sought to amend her petition by adding the allegation that "J. A. Bale entered into possession of said Lot No. 331 on July 6th, 1888, and the use and occupancy of said stairway described in said petition, and continued in such possession till his death, and his administrator and petitioner succeeded to such possession of said stairway till said defendants took possession in the manner stated in petition." The court declined to allow this amendment to be made. The court did, however, allow the plaintiff to amend by alleging that at the time of filing her original petition, and ever since that time, the defendants were and have been in possession of the portion of the stairway wrongfully taken by them, and have deprived plaintiff of the use, possession, and occupancy thereof, without right or authority, to her irreparable injury and damage; wherefore she prayed that the defendants might be perpetually enjoined and restrained from ob-

structing the stairway or depriving her of the use and occupancy of the same, and that she be granted such other equitable relief as she might be entitled to.

The defendants filed an answer in which they denied that they had committed any trespass; and subsequently amended their pleadings by alleging that, before they made any alterations in the stairway, the plaintiff agreed that the change might be made in the stairway, and they proceeded at great expense to make the alterations agreed on, without any objections being interposed by her. The case went to trial, and at the conclusion of the plaintiff's evidence the court granted a nonsuit. Exception is taken to the awarding of a nonsuit, to the refusal of the court to allow the rejected amendment to the petition, and to the ruling of the court as to the construction to be placed upon a deed relied on by the plaintiff as a muniment of title, and the rejection of the deed to J. A. Bale from Rainbow Steam Fire Engine Co. No. 1.

1. In the view we take of the case, it is unnecessary to consider whether the court did or did not err in declining to allow the proffered amendment to the plaintiff's petition. Had it been allowed a nonsuit would have been inevitable, even though the plaintiff had been permitted to prove the facts alleged in the amendment, for the reason that she would not be able to prove her case as laid. She alleged title and sought to recover for an alleged trespass, also praying for equitable relief in restraining the defendants from withholding from her the use and occupancy of the stairway; the evidence upon which she relied showed that she had a mere easement in and right to use this stairway, if she had any interest therein at all.

2. One of the deeds relied on by the plaintiff was from I. I. Todd to the Rainbow Steam Fire Engine Co. No. 1, dated November 5, 1883, reciting that the party of the first part "granted, bargained, sold, and conveyed to second party, their successors and assigns, a perpetual right and privilege to use, in common with the party of the first part, the stairway now running up between Number Ninety-Three (93) and Ninety-Five (95) Broad Street, Rome, Georgia, for all necessary purposes, being the stairway" which was the subject-matter of the controversy. This deed further recited that it was "agreed between the party of the first part and the party of the second part that the expense of

keeping the stairway above mentioned in repair [should] be borne equally," and contained a warranty clause and the usual habendum. "To have and to hold bargained premises, together all and singular the rights, members, and appurtenances thereof to the same being, belonging, or in any wise appertaining, to the only proper use, &c. of said second party, their successors and assigns, in fee simple." The court construed this deed as conveying only an easement in and to the joint use of the stairway; and we are satisfied that this was the proper construction to be placed upon it. While the instrument was loosely and carelessly drawn, with scarcely any regard for the customary rules of conveyancing, its meaning is clear that only an easement was intended to be conveyed, and not, as contended by the plaintiff, an undivided half interest in the stairway, the title to which was to be in the grantor and the grantee as tenants in common. 14 Cyc. 1161-1162.

3, 4. The plaintiff then introduced in evidence a deed to herself from C. W. Morris, administrator of J. A. Bale, to the premises in her possession, the deed reciting that the property was conveyed to her "with right of way up stairs on the side next to place now occupied by L. G. Todd as grocery store." She further proved that J. A. Bale had, on July 6, 1888, entered into the possession of the premises under a deed purporting to have been made to him by the Rainbow Steam Fire Engine Co. No. 1 on that date, and had remained in possession up to the time of his death, when his administrator, Morris, entered and held possession till he surrendered it to the plaintiff; that J. A. Bale paid to the Fire Engine Company the purchase-price of the property, \$3,200, and that the stairway was there at the time Bale bought, and continued there. Upon this proof the plaintiff sought to introduce the instrument under which Bale entered into possession of the premises, her counsel stating that it was offered as color of title. Its admission in evidence was objected to by the defendants, because (1) the corporate seal of the Fire Engine Company was not affixed, (2) there was nothing to show that the officers of that company had any authority to execute the deed, and (3) no evidence that the persons who assumed to act as its officers were so in point of fact. The court sustained the objection and excluded the deed, which described

the premises claimed by the plaintiff, and purported to convey the same together "with right of way up stairs." The deed was attested by two witnesses, one of whom was a notary public, and had been admitted to record. Proof that it was executed by the persons who signed it as the representatives of the Fire Engine Company was therefore not necessary. Civil Code, § 3628. But no corporate seal being attached, no presumption could arise that the officers of the company had authority to execute the instrument, and it was incumbent on the plaintiff to show that the persons who signed it were authorized to do so, before it could be regarded as a conveyance binding on the company. *Dodge v. American Freehold Co.*, 109 Ga. 396. And if it had been admitted as color of title, the plaintiff would not have made out her case. In fact, all she could prove was that she and those under whom she claimed had, since July 6, 1888, been enjoying an easement in a stairway adjoining the building claimed by her, and that the defendants had interfered with the enjoyment thereof by making certain alterations in the stairway, which reduced its width and made it shorter and steeper. Her evidence disclosed that, after making these alterations, the defendants did not attempt to exclude her from the use of the stairway, and that her real complaint is that they have made it too steep and reduced its width about a foot.

5. "The proper remedy for the injury or disturbance of an easement is an action on the case, and not trespass or ejectment." 14 Cyc. 1216. Or a resort may be had to equity by presenting proper pleadings and proof. "Wherever the injury complained of is irreparable, or the interference is of a permanent or continuous character, or the remedy at law by an action for damages will not afford adequate relief, injunction is a proper remedy." Ibid. 1216-1217. Throughout the trial of the present case, the plaintiff clung to her theory that she was the owner of at least an undivided half interest in the stairway adjoining her building, and that she was entitled to recover damages for the alleged trespass, and to have the defendants perpetually enjoined from continuing the trespass; no offer to amend her pleadings was made; and as the allegata and the probata did not correspond, the court properly granted the motion for a nonsuit.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

COPELAND & SON v. STEPHENS.

COBB, J. The verdict rendered in the justice's court is not altogether satisfactory, but there is some evidence upon which the finding might have been based, and the discretion of the judge of the superior court, exercised in overruling the certiorari, will not be interfered with.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Submitted April 22, — Decided May 15, 1905.

Certiorari. Before Judge Bartlett. Haralson superior court.
December 13, 1904.

James Beall, for plaintiffs in error. *E. S. Griffith*, contra.

KIRK v. KIRK.

FISH, P. J. The evidence showed mere weakness of the grantor's mind, which is not cause for setting aside his deed (*Nance v. Stockburger*, 111 Ga. 821), and was wholly insufficient to authorize a finding that the grantee, by undue influence or fraudulent means, induced him to execute the deeds the plaintiff sought to have canceled; nor was there any evidence that the defendant ever had the personalty for which the action was brought. It follows that the nonsuit was properly granted.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Argued April 24, — Decided May 15, 1905.

Equitable petition. Before Judge Freeman. Heard superior court. September 24, 1904.

Frank S. Loftin and *Sidney Holderness*, for plaintiff.

D. B. Whitaker, for defendant.

MILLER *et al.* v. ALMON.

Following the ruling in *Sasser v. Roberts*, 68 Ga. 252, in order for an exemption of the three hundred dollars worth of personal property allowed to a debtor under the provisions of the constitution found in the Civil Code, § 5914, to be effectual as against a waiver thereof, the debtor must have such personal property set apart to him as exempt, in the same manner that the homestead allowed by the constitution is set apart.

Submitted April 24. — Decided May 15, 1905.

Levy and claim. Before Judge Freeman. Heard superior court.
September term, 1904.

A crop mortgage with waiver of exemptions, signed by Rufus Miller and his wife, was foreclosed, and the mortgage *fi. fa.* was levied on 100 bushels of corn, November 23, 1901. On November 29, 1901, a schedule was filed with the ordinary, and approved and recorded, in which the corn levied on was included, as "the property of Rufus Miller, who is the head of a family consisting of his wife, Martha J. Miller, and who is a debtor having waived the benefit of the homestead so far as allowed by the constitution of Georgia, which said property is selected by himself and his said wife, . . . and claimed to be exempt from levy and sale, for the use and benefit of himself and said wife, under Article nine, section three of the constitution of Georgia, and sections 2863, 2864, 2866, and following sections of the Code of Georgia." Afterwards Miller and his wife filed with the levying officer a claim based on the alleged exemption. On the trial of the claim case the court directed a verdict against the claimants. They excepted.

D. B. Whitaker, for plaintiffs in error. *F. S. Loftin*, contra.

COBB, J. In *Simmons v. Anderson*, 56 Ga. 53, it was held that a mortgagor could waive his right to a homestead given him by the constitution in the property mortgaged. In *Flanders v. Wells*, 61 Ga. 195, it was held that a mortgagor could waive his right to the short homestead in the property mortgaged. These decisions were based upon transactions occurring prior to the adoption of the constitution of 1877. At the time the convention which framed that constitution was in session it was an open question whether a debtor would be bound by a general waiver of his homestead right where no specific property was referred to in the waiver. The constitution as framed by that convention and as finally adopted contained a provision conferring power upon a debtor to make this general waiver, and declaring that the same should be effective as against him in behalf of his creditor. Civil Code, § 5914. In *Stafford v. Elliott*, 59 Ga. 837, decided in November, 1877, after the constitutional convention had adjourned but before the constitution was ratified, it was held that a general waiver of the right to a homestead, which did not describe any particular property, would not estop the debtor from taking a homestead under the then existing law. While the

present constitution confers the power upon a debtor to make a general waiver of his homestead right, there is one restriction placed upon him, and that is, he is not authorized to make a waiver which will have the effect to estop him from claiming as exempt wearing apparel, and household and kitchen furniture and provisions not exceeding \$300 in value, to be selected by himself and wife, if any. There is nothing in the constitution which in terms declares that the property in which the waiver of exemption will not be effective shall be set apart in any particular manner. Nor is there anything which would deprive the General Assembly from so legislating in reference to this property as to protect alike the rights of the debtor as well as those of creditor. The act of December 16, 1878 (Acts 1878-9, p. 99), made provision for the setting apart of a homestead and exemption under the constitution, and also contained provisions as to the waiver of the homestead right. It was provided, that the waiver might be either general or specific, simply stating in writing that the debtor does waive and renounce the right; and that this waiver might form a part of the evidence of debt or might be contained in a separate paper. It was further provided that in cases where there was such waiver, it should be "the right of the debtor and his wife, if he has any, to select and set apart as free from levy and sale \$300 worth of household and kitchen furniture and provisions." If the execution creditor who holds the waiver should be of opinion that the property so selected and set apart is of greater value than three hundred dollars, he is authorized to indemnify the officer and cause a levy to be made, and either the debtor or his wife can deliver to the levying officer an affidavit stating that the property selected is not of greater value than \$300; and this levy and affidavit shall be returned to the superior court of the county of the residence of the debtor, to be tried as cases of illegality, the jury to determine the question as to the value of the property, and, if the finding is in favor of the execution creditor, specifically describing what portion of the property is of the value of \$300, which shall be preserved to the debtor, and the balance be sold; there being a distinct provision authorizing the jury to assess damages, not exceeding 25% of the value of the property levied upon, against the execution creditor, in the event they are of opinion.

that the levy was not made in good faith but simply for the purpose of harassing the debtor. Civil Code, § 2864.

It would seem that under these provisions the rights of a creditor holding a waiver, as well as the rights of the debtor and his family, were amply protected. There is nothing either in the constitution or the act of 1878 which expressly declares that the selection of the property by the debtor and his wife should be approved by any tribunal or public officer. But in *Sasser v. Roberts*, 68 Ga. 252, it was held that the property claimed not to be affected by the waiver must not only be selected by the debtor and his wife, but also set apart by the ordinary, and that a mere personal claim to described property as so selected, with no official action thereon, is not sufficient. Mr. Justice Speer says, in the opinion, that the debtor "must proceed to have the same set apart and exempted as provided by law in the court that has jurisdiction thereof." The reasoning of the learned Justice leads inevitably to the conclusion that the exemption of the property claimed not to be affected by the waiver is not complete until the formalities of law are complied with that are required to make complete the homestead provided for in the constitution. If it were now an open question, we would be inclined to hold that not only under the constitution, but under the act of 1878, nothing more was necessary in reference to the identification of the property claimed not to be affected by the waiver than the selection of such property by the debtor and his wife, such selection being subject to be reviewed at the instance of the execution creditor in the manner prescribed in the act of 1878. But the ruling in the case cited goes to the extent above indicated, and is absolutely controlling upon us; and we therefore must hold that the debtor can not claim as exempt from levy and sale property as to which the law does not permit him to make an effective waiver, until this property has been identified and set apart in the manner prescribed for setting apart an ordinary homestead under the constitution. The judgment must therefore be

Affirmed. All the Justices concur, except Candler, J., absent.

ATLANTA & WEST POINT RAILROAD CO. v. HUDSON.

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1. Except where a particular act is declared to be negligence, either by statute or by a valid municipal ordinance, the question as to what acts do or do not constitute negligence is for determination by the jury, and it is error for the presiding judge to instruct them what ordinary care requires should be done in a particular case.
2. Language used by the Supreme Court in deciding a case before it, especially where used in discussing the facts of such case, is often inappropriate for use by the judge of a trial court in charging the jury.
3. In an action against a railroad company for the killing of cattle, it was error for the presiding judge to instruct the jury that if they should find from the evidence that the defendant "did use all the means at its command, after the cattle were discovered on the track, or so near thereto, as the court has already charged you, and exercised all ordinary care and reasonable diligence to prevent the train from running over the cattle," the presumption arising from proof of killing the cattle would be rebutted. The requirement that the company should use "all the means at its command," was more stringent than the law provides.

Argued April 24, — Decided May 15, 1905.

Action for damages. Before D. J. Gaffney, judge pro hac vice.
City court of LaGrange. October 21, 1904.

Hudson brought suit against the Atlanta and West Point Railroad Company, seeking to recover for the killing and injury of certain cattle alleged to have been struck by one of its trains. It is unnecessary to set out the evidence. The jury found for the plaintiff. The defendant moved for a new trial; and upon its being denied, excepted.

Dorsey, Brewster & Howell, A. H. Thompson, and Arthur Heyman, for plaintiff in error.

J. R. Terrell and F. P. Longley, contra.

LUMPKIN, J. (After stating the facts.) 1, 2. Several charges of the judge were alleged as error on the ground that they undertook to instruct the jury what acts ordinary care required the employees of the company to do. In one instance he charged as follows: "You will look to all these questions under the evidence in this case, to determine the truth of the same for yourselves; for the law imposes the duty on the railroad company to maintain a lookout to discover cattle on its track, to stop its train as soon as cattle appear upon its track, or in the act of approaching it, or so near to the same that a slight change of position

by them would result in their destruction or injury." This was error. "In the trial of an action in a court of this State, for a negligent tort, it is error for the court to tell the jury what facts do or do not constitute negligence, unless there is a statute or valid municipal ordinance which in terms or in effect declares the act referred to to be negligence." *Savannah Ry. Co. v. Evans*, 115 Ga. 315, 316.

That the Supreme Court may employ certain language in discussing a case, especially in regard to the facts under consideration, does not necessarily render such language proper for use by the judge of a trial court in charging a jury. A Justice of the Supreme Court, in giving reasons for a judgment rendered, often uses argumentative language which would be wholly inappropriate for use in a charge by a judge of a trial court. There is no prohibition of law against an expression of opinion on the facts of the case by the Supreme Court. There is a direct prohibition as to an expression of such an opinion by a trial judge in his charge. Civil Code, § 4334. The presiding judge gave to the jury, as propositions of law, substantially certain statements which were made in opinions of this court in discussing the facts of cases then before it. *East Tenn. Railway Co. v. Burney*, 85 Ga. 636; *Central of Ga. Ry. Co. v. Ross*, 107 Ga. 75; *Atlantic Coast Line R. Co. v. Williams*, 120 Ga. 1046, 1047. What was said in those decisions was in connection with the question of whether the verdicts were sustained by the evidence, and whether there was in fact evidence of negligence. The difference between such discussions and legal propositions suitable for a charge is obvious. The trial judge should not tell the jury what acts would constitute negligence, and what would not, but should instruct them as to the proper measure of diligence, and leave them to determine, in view of all the evidence bearing on the subject of the time, place, circumstances, and happenings, whether there was or was not a want of due care. *Central of Ga. Ry. Co. v. McKenney*, 118 Ga. 535; *Calvin v. State*, 118 Ga. 73; *Savannah, F. & W. Ry. Co. v. Evans*, 115 Ga. 315, 316, *supra*. There is no conflict between this ruling and that in *Western & Atlantic R. Co. v. Burnham*, 123 Ga. 28. There is a wide difference between charging as to a duty imposed by law upon a carrier of passengers, and telling the jury that it was the duty of

the railroad company to do certain specified acts to avoid injury to cattle along the road.

3. The measure of duty required of the employees of a railroad company in respect to stock along the line of its road is ordinary care. A charge which submitted to the jury to determine whether the defendant company "did use all the means at its command" declared too stringent a rule, and was erroneous. See cases cited in Hopkins on Personal Injuries, § 59; *Florida Central and Peninsular R. Co. v. Lucas*, 110 Ga. 121, 123.

Judgment reversed. All the Justices concur, except Candler, J., absent.

SMITH *et al.* v. HIGHTOWER.

FISH, P. J. This case falls within the rule, repeatedly announced by this court, that where it does not affirmatively appear that the verdict was demanded under the law and the evidence, the first grant of a new trial will not be disturbed, though based on a specified ground of the motion, whether such ground was meritorious or not. *Elliott v. McCalla*, ante, 26.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

Submitted April 25, — Decided May 15, 1905.

Complaint. Before Judge Longley. City court of LaGrange. October 17, 1904.

D. J. Gaffney, for plaintiff in error.

F. P. Longley and *Isaac Jackson*, contra.

THOMPSON v. HAYS.

1. Where a certificate to a bill of exceptions is undated, it will be presumed that an acknowledgment of service appearing on the bill of exceptions was made after the bill of exceptions was certified by the judge and within ten days thereof.
2. Even if in a case at law the judge has a discretion to continue a case more than one time for any cause at the instance of the same party, it would have been an abuse of discretion to grant a continuance in the present case; and it was therefore error to sustain a ground of a motion for a new trial assigning error upon the refusal to grant a continuance.

Submitted April 25, — Decided May 15, 1905.

Complaint. Before Judge Hodnett. City court of Carrollton. December 5, 1904.

After the reversal of a former judgment in this case (119 *Ga.* 167), there was another trial, which resulted in a verdict against the defendant; and his motion for a new trial was granted, solely on the ground that the court erred in refusing to continue the case on account of the non-return of interrogatories. The plaintiff excepted. From the motion for a new trial it appears that in support of his motion to continue the case the defendant testified, that he expected to prove by Weathers, the witness whose interrogatories had not been returned, that Weathers was his partner in the contract on which the suit was brought, and was present when it was made; that the interrogatories were sued out while Weathers was living in Clay county, Alabama, and were executed, but an objection to their return was sustained by the court; that he afterwards learned that Weathers had moved to Birmingham, Alabama; that he "sent \$5 to Weathers while in Clay county, Alabama, to pay for having interrogatories executed and returned;" that the motion for a continuance was not made for delay only; that he expected this evidence at the next term, and could not safely go to trial without it; that he had no other witness by whom he could prove the same facts; and that the case had been once before continued at the defendant's instance on account of the non-return of interrogatories of another witness. The defendant's attorney stated in his place, that when he learned that Weathers had left Clay county, Alabama, and had gone to Birmingham, he notified counsel for the plaintiff; that the plaintiff's counsel nominated two commissioners at Birmingham, one of whom was Mr. Washington; that he sent the interrogatories by mail to Mr. Washington, with the address of the witness, and requested him to execute the interrogatories in connection with the other commissioner; and that no money was sent to Mr. Washington. Counsel for the plaintiff, by way of counter-showing, stated in his place, that, a few days before, he was in Birmingham and saw the witness, Weathers, and Mr. Washington; that Mr. Washington had the interrogatories, and showed him a letter from the defendant's counsel, in which he stated that he supposed the plaintiff would pay for the execution of the interrogatories; that Mr. Washington asked plaintiff's counsel what to do about executing the interrogatories, and he replied that he did not know, as he had nothing to do with them.

The certificate to the bill of exceptions is not dated; and there was a motion to dismiss the writ of error, because it does not affirmatively appear that the service of the bill of exceptions was made after the signing of the certificate by the presiding judge, nor that the service of the bill of exceptions was within ten days after the bill of exceptions was signed.

E. S. Griffith and James Beall, for plaintiff in error.

W. F. Brown, contra.

COBB, J. 1. Both grounds of the motion to dismiss the writ of error are without merit. *Porter v. Holmes*, 122 Ga. 780; *McCain v. Bonner*, Id. 842.

2. The rule laid down in the code in reference to a continuance for the non-return of interrogatories is as follows: "When a commission issues to examine a witness, it not having been returned shall be no cause for a continuance, unless the party seeking the continuance will make the same oath of the materiality of the testimony as in the case of an absent witness, and the party must show due diligence in suing out and having the same executed." Civil Code, §5136. The showing in the present case seems to comply with the requirements of the law, except as to the diligence exercised by the defendant in securing the return of the interrogatories. We think it was fatally lacking at this point. It was certainly not an act of diligence to rely upon the opposite party to pay the fees of the commissioners, even though such commissioners were nominated by him. The law gives the right to the opposite party to select two commissioners, one of whom must act in the execution of the interrogatories; but we know of no law which authorizes the party suing out the interrogatories to rely upon his adversary to pay the expenses of interrogatories taken out in his own behalf. Even if the judge has any discretion to grant a second continuance in a case at law, at the instance of the same party (Civil Code, §5126), we think that the showing in this case was insufficient, and that the granting of a new trial, which was in effect the granting of a second continuance, was an abuse of discretion.

Judgment reversed. All the Justices concur, except Candler, J., absent.

KELSEY v. JACKSON *et al.*

1. In order for a church to sue or be sued as an entity, it must have been incorporated, or else certificates of the appointment of trustees must have been filed as provided by the Civil Code, § 2355.
2. If trustees hold title to property for a church which has not been incorporated, and where no certificate has been filed as provided by the code section just cited, nevertheless the trust property may be subjected, by proper proceedings, to a debt for which it is liable.
3. In such a proceeding the trustees are the only necessary parties defendant.
4. Trust property of an unincorporated church in the hands of trustees can be subjected for a debt duly incurred to the pastor for salary and rent of parsonage, and, in the absence of other property, the church edifice and site in the hands of trustees can be subjected for such a debt.

Argued April 25, — Decided May 15, 1905.

Complaint. Before Judge Longley. City court of LaGrange. December term, 1904.

Kelsey brought suit against Jackson and others, as deacons and trustees of the First Baptist Church, colored, of LaGrange. He alleged that they were the trustees of the church, and that the title to the church property was in them, and they held and controlled it for the benefit of said church. Certain real estate was described, and it was alleged that there was no other trust property. He further alleged that the church was indebted to him a stated amount for salary as pastor, and also a certain amount for the rent of a parsonage for him to occupy; that these debts were regularly created by the conference, the proper authority under the laws of the church to make such a contract, create the debt, and bind the property; that this was an indebtedness of the trust estate, and for which it was liable; and it was sought to obtain a judgment subjecting it to the payment of the claim. It was not alleged that the church was incorporated, or that any certificate or certificates had been filed as provided in the Civil Code, § 2355. On demurrer the presiding judge dismissed the petition, because it did not appear that the church had been incorporated, or the names of the trustees entered of record, or the name, style, and objects of the association recorded as required by the statute; and also on the ground that the plaintiff is seeking a special judgment against the trust estate for services rendered the *cestuis que trust*.

Harwell & Lovejoy, for plaintiff.

D. J. Gaffney and *F. P. Longley*, for defendants.

LUMPKIN, J. (After stating the facts.) 1-3. An action can not be brought by or against an unincorporated church as an entity. *Thurmond v. Cedar Springs Baptist Church*, 110 Ga. 816; *Mutual Life Ins. Co. v. Inman Park Presbyterian Church*, 111 Ga. 677; *Wilkins v. Wardens of St. Mark's Church*, 52 Ga. 351. Incorporation which will authorize suit to be brought by or against a church may be had under section 2351 of the Civil Code, or by filing a certificate as provided in section 2355 of the Civil Code. See also §§ 2356, 2357. Where it does not appear that a church has been incorporated, or that a certificate has been filed, but it is alleged that the title to the trust property is in certain trustees, a proceeding to subject the trust property to a debt for which it is liable can be brought under section 3202 of the Civil Code; and to such action the trustees are the only necessary parties. *Josey v. Union Loan & Trust Co.*, 106 Ga. 608, 611.

4. A church is not a commercial organization which holds property by itself, or through trustees, for purposes of gain and profit. The advancement of religion is of the essence of the trust. The pastor is a factor in such promotion. A church is bound to pay the salary of the pastor. And as he must be housed, where the contract under which he is employed includes both the payment of a salary and the rent of a parsonage for his occupancy, the entire debt stands on the same basis of equity and justice. If the divine law does not prompt the members to pay such a debt, human law will enforce it. *Lyons v. Planters Loan & Savings Bank*, 86 Ga. 485. In the absence of other property, the church edifice and site in the hands of trustees can be subjected for the payment of such a debt. Civil Code, § 2361.

Judgment reversed. All the Justices concur, except Candler, J., absent.

BONNER v. MILLEDGEVILLE RAILWAY COMPANY.

1. An act to incorporate a named railroad company, "and to define its rights, powers, and privileges, and for other purposes," is not unconstitutional as containing matter different from that expressed in its title, or as relating to more than one subject-matter, because in the body of the act it is provided that the corporation shall have the right to construct and equip such lines or routes "as have already or may hereafter be agreed upon and contracted for" by the incorporators and the municipal authorities of the city in which the line is to be constructed, and that "the use and enjoyment of so much of the public streets of said city as has heretofore been granted to said corporators by [the municipal authorities] is hereby confirmed in and unto the said corporation."
2. Under such an act, passed in 1888, where a company operating under a charter thus created is granted the right, by the municipal authorities in 1905, to lay a spur-track in the streets of the city, the right so granted may be exercised independently of the question whether the original charter right to lay spur-tracks was exhausted with the first use.

Argued May 1, — Decided May 15, 1905.

Petition for injunction. Before Judge Lewis. Baldwin superior court. March 22, 1905.

Hines & Vinson and *J. D. Howard*, for plaintiff.

Allen & Pottle, for defendant.

FISH, P. J. This was an action to enjoin the Milledgeville Railway Company from constructing a spur-track on its line of railroad on a named street in the City of Milledgeville. The petition alleged that for various reasons the proposed track would be injurious to the plaintiff, and would constitute a public nuisance, and that the defendant was without charter authority to do the work contemplated. A temporary restraining order was granted; but on the hearing this was dissolved and an interlocutory injunction was denied; whereupon the plaintiff excepted. The evidence as to the alleged injurious effect upon the plaintiff of the laying of the track proposed was directly in conflict, and would have supported a decision for either the plaintiff or the defendant. The case as argued in this court turns entirely upon the authority of the defendant company to lay the track.

1. The defendant is operating under a charter granted in 1888 to the Milledgeville and Asylum Dummy Railroad Company, whose successor it is. The title of the act incorporating that company is as follows: "An act to incorporate the Milledgeville and Asylum Dummy Railroad Company, and to define its

rights, powers, and privileges, and for other purposes." By section 4 it was provided "that said corporation shall have full power and authority to survey, lay out, construct, equip, use, and enjoy lines or routes of said road in the City of Milledgeville, as have been already or may hereafter be agreed upon and contracted for by the aforesaid corporators and the Mayor and Aldermen of said City of Milledgeville; and the use and enjoyment of so much of the public streets of said city as has heretofore been granted to said corporators by the said Mayor and Aldermen is hereby confirmed in and unto the said corporation." It is urged by counsel for the plaintiff that the act of incorporation is unconstitutional, in that it contains matter different from that expressed in its title, and refers to more than one subject-matter; and the section which we have just quoted is cited as the basis of that contention. We can not agree that this position is sound. One of the purposes of the act, as expressed in its title, is to define the rights, powers, and privileges of the company being incorporated, and the section quoted is plainly in line with that purpose. The fact that reference is made to a grant of privileges by the city to the corporators of the company at a time when the city had no legislative authority to make the grant does not alter the principle involved or make the act unconstitutional; for it was clearly within the power of the General Assembly to ratify and confirm what had already been done by the city, regardless of the city's authority to do it at the time. This ratification was germane to the general subject of defining the rights and privileges of the company being incorporated, and so the act was not objectionable as referring to more than one subject-matter.

2. By a contract executed September 18, 1888, prior to the passage of the act incorporating the Milledgeville and Asylum Dummy Railroad Company (which, as will have been seen, was ratified by the General Assembly in the passage of that act), the City of Milledgeville "demised and leased unto the said Milledgeville and Asylum Dummy Railroad Company so much of the streets of the said city as may be necessary for a good and sufficient road-bed" for a term of ninety-nine years. The contract recited a consideration, designated the streets to which it referred and over which the right of way was granted, and provided that "the above-described right of way shall include

and embrace sufficient ground upon which to construct and build what are known as and called spur, switches, and sidings." It is insisted by the plaintiff that even if the act incorporating the Milledgeville and Asylum Dummy Railroad Company is valid and constitutional, the power to construct switches and spurs was exhausted with the first construction of the track and the election by the company of the places at which they would build such spurs or switches. This is a question which must necessarily turn upon the power granted to the corporation in its charter; and as has been seen, under the act incorporating the Milledgeville and Asylum Dummy Railroad Company, that company was granted authority to construct such lines or routes in the City of Milledgeville "as have been already or may hereafter be agreed upon and contracted for by the aforesaid corporators and the Mayor and Aldermen of said City of Milledgeville." Regardless of the question whether or not, under the contract between the City of Milledgeville and the Milledgeville and Asylum Dummy Railroad Company, executed in 1888, the defendant company had the right in 1905 to lay spur-tracks on the streets of the City of Milledgeville, it appears that express and specific authority has been granted it by the Mayor and Aldermen to lay this particular spur. Clearly, then, there can be no question as to whether the defendant exhausted its original charter right to lay spur-tracks by the first exercise of that right; for it is acting under a new power granted by the City of Milledgeville and expressly provided for by the act under which its predecessor was incorporated. We will state in passing, however, that the cases relied on by counsel for the plaintiff, viz., *Alabama Great Southern R. Co. v. Gilbert*, 71 Ga. 594, and *Savannah R. Co. v. Woodruff*, 86 Ga. 94, were thoroughly analyzed by Mr. Justice Candler in his able opinion in the case of *Gardner v. Georgia R. Co.*, 117 Ga. 534 (5), and it was conclusively shown that the language quoted and relied on by counsel for the plaintiff in the present case was obiter and not binding.

From the foregoing it follows that the judgment refusing to grant an interlocutory injunction as prayed for was not erroneous.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

SUMNER v. SUMNER.

After an order granting temporary alimony and attorney's fees has been duly passed, the court is without jurisdiction to revise the same or to set it aside on any ground save one based on a change of circumstances occurring subsequently to the granting of the order. It is not ground for vacating the order, that the husband sought to review its correctness before the Supreme Court, but his bill of exceptions was dismissed in that court because of his failure to observe the statutory requirements as to suing out a writ of error; that subsequently, upon the same evidence on which the order for temporary alimony had been granted, a jury found in favor of the wife on the trial of a suit by her for permanent alimony, and that the verdict was set aside by the Supreme Court upon a review of that case, the court holding that under the evidence upon which she relied for a recovery she was not entitled to prevail. Such a chain of circumstances does not constitute such a change in the status of the parties as will confer upon the husband a right to another hearing on the question of his liability to pay temporary alimony pending the suit for permanent alimony.

Argued March 21, — Decided May 15, 1905.

Attachment for contempt. Before Judge Spence. Worth superior court. February 14, 1905.

J. W. Walters and *J. J. Forehand*, for plaintiff in error.

Claude Payton and *Sam. S. Bennet*, contra.

EVANS, J. This is the fourth time we have been called on to review the contest between this husband and wife over the allowance of alimony. The other cases are reported in 116 *Ga.* 798, 118 *Ga.* 408, and 121 *Ga.* 1. The statement of facts in the case last reported contains a succinct history of the litigation, and it is only necessary to chronicle the subsequent procedure. On January 5, 1905, Mrs. S. J. Sumner presented her petition to the judge of the superior court of Worth county, alleging that on September 8, 1902, upon the application of petitioner for temporary alimony and counsel fees, a decree was entered requiring J. L. Sumner to pay to her, among other things, temporary alimony at the rate of sixty dollars per month on the first day of each month thereafter until otherwise ordered, which judgment had never been annulled or modified. She further alleged, that on November 7, 1903, upon her application, an order was passed requiring J. L. Sumner, within thirty days thereafter, to pay her the additional sum of \$700 for counsel fees and expenses of the litigation; that this last order was passed during the trial of the

issue joined on her application for permanent alimony, which resulted in a verdict for petitioner in a few hours after the order for temporary alimony was signed; and that the present proceeding was brought for the purpose of enforcing the payment of the amount due for temporary alimony and counsel fees upon these two last-mentioned orders. Petitioner averred that J. L. Sumner had defaulted in the monthly payments since December 1, 1904, and had wholly failed to pay the amount decreed for counsel fees and expenses of litigation; and the prayer of the petition was, that, upon his failure to pay the sums then due, he be adjudged in contempt. In answer to the rule to show cause why he should not pay the sums alleged to be due as temporary alimony and counsel fees, or in default thereof be adjudged in contempt, the defendant admitted that the judgments referred to had never been annulled or modified, and that he had not paid the monthly allowance since December 1, 1904, nor the counsel fees provided for in the order of November 7, 1903, but alleged, as an excuse for not so doing, that before the filing of the applications for temporary and permanent alimony he had made a full and complete settlement with his wife, conveying to her by deed a life-estate in what was known as their "home place," together with certain stock, provisions, farming implements, and cash, which were accepted by Mrs. Sumner as a full and final settlement of all of her claims against him for temporary and permanent alimony and all future interest in his estate; that he had pleaded this settlement in answer to her suit for temporary alimony, but that the presiding judge had held the settlement between the parties to be null and void and had decreed that respondent pay to his wife a certain sum monthly as temporary alimony until the further order of the court; that respondent attempted to review this judgment by a writ of error to the Supreme Court, but his bill of exceptions was dismissed upon a technicality and the merits of the case were not passed upon by the Supreme Court; that he continued paying alimony until a decision of the Supreme Court was rendered upon a bill of exceptions sued out to the overruling of a motion for a new trial, made by respondent in the suit for permanent alimony, when the Supreme Court passed upon and construed the settlement relied on by him and upheld it, deciding that the same was valid and there was no evi-

dence to justify the verdict returned against respondent in the superior court. Respondent further alleged that this adjudication by the Supreme Court amounted to a change in the circumstances of the respective parties, and he should not be required to pay any further sums as temporary alimony, because of the adjudication that the settlement between himself and wife was valid, which adjudication was conclusive as to all amounts claimed to be due either as temporary or permanent alimony; and respondent prayed that the orders of the court granting temporary alimony and allowing counsel fees to Mrs. Sumner be annulled, and that he be discharged from the rule. The only evidence submitted to the court upon the hearing of the petition of Mrs. Sumner and the answer made thereto consisted of three affidavits to the effect that the defendant was in better financial condition at that time than he had been at the time of the rendering of the judgments allowing alimony; that the applicant was in no better financial condition, and because of her advanced age and ill health more money was required for medicine and medical attention than was required at the time these judgments were rendered. The court declined to revise or revoke the original orders granting temporary alimony, and adjudged that no sufficient reason had been shown why the defendant ought not to pay the sums due thereunder. An order was accordingly passed, providing that, upon the failure of respondent to pay these sums within ten days, an attachment against him for contempt should issue. He excepts to this judgment, insisting that the judge abused his discretion in refusing to vacate the orders previously granted for temporary alimony and attorney's fees, these orders being based upon the idea that, under the evidence submitted at the hearing first had, the deed of settlement made by J. L. Sumner to his wife was void, and the Supreme Court having subsequently held that under the evidence relied on by Mrs. Sumner as showing the deed to be invalid, the verdict of the jury in her favor was unauthorized, and she was not entitled to recover permanent alimony; wherefore the judge should have "recognized the changed condition brought about by said decision of the Supreme Court, and revoked his previous orders granting attorney's fees and temporary alimony."

An order granting temporary alimony and counsel fees is always subject to revision by the court. Civil Code, § 2459.

The court may at any time, on proper pleadings and proof, change, modify, or even annul it altogether. *Wester v. Martin*, 115 Ga. 776. But the court is without jurisdiction to revise the same or set it aside on any ground save one based on a change of circumstances occurring subsequently to the granting thereof. *Sumner v. Sumner*, 118 Ga. 408. The changed condition relied on by the plaintiff in error is an adjudication by this court, since the allowance of temporary alimony, as to the weight and effect of certain evidence offered by Mrs. Sumner to impeach a deed of settlement executed and delivered to her by her husband. This adjudication was upon a bill of exceptions in which error was assigned upon the refusal of the trial judge to grant the defendant a new trial and vacate the verdict in the suit for permanent alimony, and it was held that the evidence introduced by Mrs. Sumner did not warrant a finding that any such fraud was perpetrated upon her as would afford grounds for the cancellation of that deed of settlement. *Sumner v. Sumner*, 121 Ga. 1. The necessary result of this adjudication was that the verdict returned in the suit for permanent alimony was vacated and a new trial ordered upon the merits. On the next trial the plaintiff may supplement her proof so as to authorize a rescission of the contract of settlement on the ground of fraud. Of course, it is not known to us whether or not such additional proof can be made; but inasmuch as the case is open for a new trial and the applicant is at liberty to introduce additional testimony, we can not arbitrarily assume that the controversy is practically at an end, that J. L. Sumner will prevail upon the next hearing of the case and be relieved from all liability to pay permanent alimony. It affirmatively appears that to the application for temporary alimony, which resulted in the order of September 8, 1902, the defendant answered that the plaintiff was not entitled to alimony, because she had by voluntary settlement accepted certain property conveyed to her by her husband in full discharge of all claims for alimony, both temporary and permanent. The ineffective effort of the defendant to review the correctness of that order does not prevent it being final and conclusive as to all matters which existed at the time it was granted. The effect of the dismissal of his bill of exceptions was to affirm the judgment of the lower court, and this judgment can not, as was pointed

out in 118 *Ga.*, be revised or annulled for matters existing at the time of its rendition. The adjudication of the Supreme Court simply settled the question as to the sufficiency of the evidence offered by Mrs. Sumner in support of her contention that the contract of settlement should be set aside on the ground of fraud. The decision of this court concludes her no further than to negative her right, upon the same evidence as that relied on at the first trial of the suit for permanent alimony, to have the deed of settlement set aside; it does not constitute a change in the condition or circumstances of the parties, and does not furnish any ground for the vacation or revision of the orders granting temporary alimony and counsel fees.

Judgment affirmed. All the Justices concur, except Cobb, J., disqualified, Candler, J., absent, and Lumpkin, J., not presiding.

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1127 317

STANLEY, by next friend, *v.* STANLEY *et al.*

When a suit is instituted by one as the next friend of a person duly adjudged insane, but the petition does not disclose that the latter has no guardian, or allege any reason why it is necessary for him to sue by a next friend rather than by a duly appointed guardian, objection to the maintenance of the action may be made by special demurrer calling on the person instituting the suit to show by what right it was so brought in behalf of the insane person named as plaintiff; and if the special demurrer is not met by appropriate amendment, it is proper for the court to dismiss the action.

Argued April 15, — Decided May 15, — Motion to modify judgment
denied June 27, 1905.

Equitable petition. Before Judge Gober. Cobb superior court.
January 20, 1905.

An action was instituted in the name of James F. Stanley, suing by his next friend Nancy Rusk, against his wife, Mrs. Hattie Stanley, individually and as the natural guardian of her minor child. It was alleged that James F. Stanley was, on or about April 20, 1898, detained under a commission of lunacy issuing from the court of ordinary of Cobb county; that he was tried thereunder, adjudged to be insane, and sent to the State Lunatic Asylum at Milledgeville, Ga., from which institution he was released on or about October 28, 1899, without any certificate that he had regained possession of his mind; that he had

never in fact regained his normal state of mind, is still of unsound mind, and that the judgment of the court of ordinary finding him to be insane still remains of force. The petition also set forth the following allegations of fact: While Stanley was suffering from his mental infirmity, and after he had been adjudged insane, his wife instituted proceedings against him to recover alimony for herself and child; no guardian ad litem was appointed by the court to represent him, nor had he sufficient mental capacity to defend the suit; and on December 4, 1901, a verdict and judgment for \$700 were rendered against him. An execution issuing from this judgment has been levied on certain land belonging to him, and the sheriff is proceeding to bring the land to sale. The plaintiff attacked this judgment as void, because fraudulently obtained by Mrs. Stanley under the circumstances stated, and prayed that the sale of the land thereunder be enjoined and that the judgment be set aside. The court declined to grant a restraining order, and the land was subsequently sold, A. E. Benson becoming the purchaser. By amendment the plaintiff set up these facts, also alleging that before the sale Benson had been put upon notice of the suit filed to set the judgment aside, and prayed that he be made a party defendant. The plaintiff also amended the original petition by adding various allegations to the effect that Mrs. Stanley was not entitled to alimony, and that Stanley, had he been under no disability, could have urged certain meritorious defenses to her action and defeated a recovery by her.

To the petition as amended the defendants demurred both generally and specially, and the court passed an order sustaining the general and special demurrers and dismissing the action. To this judgment exception is taken.

O. E. & M. C. Horton, for plaintiff.

J. Z. Foster, for defendants.

EVANS, J. (After stating the facts.) Irrespective of the question whether or not the petition as finally amended set forth a state of facts showing that Stanley was entitled to have the judgment rendered against him in the suit for alimony set aside, the judgment of the trial court dismissing the action should be affirmed, for the reason that no offer was made to meet the objec-

tion, raised by one of the special demurrers filed by the defendants, that neither the original petition nor any of the amendments thereto disclosed that Mrs. Nancy Rusk had any authority to act for Stanley as next friend in bringing the suit, nor did it appear that he had no guardian, nor was any reason alleged why he did not sue by guardian. This objection was well taken, and presumably an appropriate amendment would have been made to overcome it, if the fact was that Mrs. Rusk could legally maintain the action in her capacity as next friend for Stanley, whom she alleged to be her father. In the case of *Reese v. Reese*, 89 Ga. 645, the question arose whether or not, under any circumstances, a suit could be brought in behalf of one non compos mentis by any one save a duly appointed guardian, and this court decided, in view of the provisions of the Civil Code, § 4843, and the generally recognized rule obtaining in other jurisdictions, that where no guardian has been legally appointed to represent an insane person, the courts, whether of law or of equity, have jurisdiction to entertain suits brought by one as next friend of the insane person. This decision was approved and followed in *Dent v. Merriam*, 113 Ga. 83; and in *LaGrange Mills v. Kener*, 121 Ga. 429, it was held that "A suit by a next friend for a lunatic, who has been adjudged insane, which fails to allege that the lunatic has no guardian, or any sufficient reason why she does not appear by her guardian if she has one, is maintainable, unless the failure to make allegations of this character is made ground of objection in a special demurrer, or by plea in abatement." In the latter case the demurrer did not raise the proper objection to the maintenance of the action; so the judgment overruling the demurrer was affirmed. As was clearly intimated, however, the objection, if raised, would have been cause for dismissing the action, unless met by appropriate amendment. See *Nance v. Stockburger*, 112 Ga. 90.

Where one can not, except under special circumstances, maintain a suit in his own behalf or for the benefit of another, it is incumbent upon him to disclose the facts giving him a right to bring the action. Thus, before the heirs at law of an intestate can recover land belonging to his estate, they must allege and prove either that there was no administration upon the estate or that the administrator, if there be one, has assented to their bringing the suit (*Greenfield v. McIntyre*, 112 Ga. 691); and if they

fail to make the necessary allegations as to their right to sue, the omission to do so may be taken advantage of by appropriate special demurrer. *Crummey v. Bentley*, 114 Ga. 749.

In view of the conclusion above announced, it is unnecessary to deal with either the general demurrer or the several other grounds of the special demurrer. The judgment dismissing the action is affirmed, because of the failure of Mrs. Nancy Rusk to make it appear to the court that she had authority to institute the action in behalf of James F. Stanley, irrespective of the question whether or not the petition set forth a cause of action, and without prejudice to him should suit be subsequently brought in his behalf by a person authorized to institute and maintain the action.

Judgment affirmed. All the Justices concur, except Candler, J., absent.

SUTTON v. THE STATE.

On the trial of an indictment for assault with intent to rape, where there was evidence from which the jury was authorized to find that an assault was committed by the accused with the intention of gaining the woman's consent to have sexual intercourse with him, but without any intent to overpower her will and commit the crime of rape, it was error to fail to give in charge the law of assault and of assault and battery.

Argued April 17, — Decided June 13, 1905.

Indictment for assault with intent to rape. Before Judge Spence. Decatur superior court. March 6, 1905.

The accused, O. N. Sutton, was tried under an indictment charging him with the offense of assault with intent to rape. The following verdict was rendered: "We, the jury, find the defendant guilty, and recommend him to extreme mercy." The judge disregarded the recommendation, and sentenced the accused to ten years in the penitentiary. Sutton filed a motion for a new trial, which was overruled, and he excepted.

The girl alleged to have been assaulted testified, in substance, that on the occasion under investigation she was living with a family by whom she had been adopted; that her foster-parents were not at home; that shortly after dark she started to go out in the back yard, when she was startled by hearing a stick crack in the darkness, and turned to return to the house. Before she

could do so she was seized by the accused, who took her in his arms and carried her to a buggy standing near and placed her inside, getting in also and driving away. She called to him to turn her loose, but he would not do so. She did not get into the buggy voluntarily. The accused drove through certain described streets of the town of Bainbridge, and past several people. She cried out, but no one came to her relief. The accused kept his arm around her to keep her from getting out of the buggy. After leaving Bainbridge and driving for about an hour through the country, the accused assaulted her. The manner of the assault can best be described by quoting verbatim from the testimony of the injured party: "He did not stop the buggy when he made the assault, but was still driving on. He took off my guard. I was having what is called menstrual sickness at the time. . . At the time he was doing that he said, "Give me some." I asked him "What?" He pointed here, and I told him I was not going to do it. Then he said he was going to do it anyhow. When he said this he took me in his lap. He had unbuttoned my union suit and took off my guard at this time. He took me in his lap. I slapped him, and he told me to quit; and I told him I was not going to do it until he quit; and he quit." This happened on a lonely country road at night. The accused then drove on to the home of a Mrs. Russell, several miles distant, where the girl spent the night. The accused admitted driving through the country with the girl at night, but claimed that it was done not only with her consent, but after her earnest entreaties that he take her away from her foster-parents, whom she represented to have been cruel to her. He denied emphatically having proposed to her to have sexual intercourse with him or having assaulted her in any way.

W. D. Sheffield, W. I. Geer, and A. G. Powell, for plaintiff in error. W. E. Wooten, solicitor-general, by R. R. Arnold, contra.

CANDLER, J. (After stating the foregoing facts.) The first five grounds of the amendment to the motion for a new trial raise practically the same point, and complain of the failure of the court below to give in charge the law relating to the offense of assault or assault and battery. After a very careful reading of the brief of evidence we have reached the conclusion that these offenses were necessarily involved in the case, and that the

court should have elucidated them in charging the jury. The contention of counsel for the State, that as the accused denied making an assault of any character he was not entitled to a charge on the minor offenses named, is hardly sound. The jury were the sole judges of the facts, and it was their privilege to draw their conclusions from the entire evidence, or from any part of it. They were at liberty to reject the statement of the accused that he made no improper advances to the female alleged to have been assaulted, and at the same time form their own opinion from her testimony as to the gravity of the assault and the intent with which it was committed. Certainly there was, in the testimony of the girl in this case, ample ground for a finding that an assault was made, but with no intention to commit the crime of rape. The statement made by her, that the accused did not stop driving during the occurrence about which she testified; that he used no further force than was necessary to remove certain parts of her clothing; that a running conversation was carried on; and that the accused desisted upon being slapped by her, might well be considered by the jury as incompatible with an intention to commit the crime of rape. And yet there was ample warrant for a finding that an assault was committed upon the girl by the accused, and that his intention was to procure her consent to an act of sexual intercourse with him, but not to persist in the assault if that consent was withheld. The case of *Tiller v. State*, 101 Ga. 782, is closely in point on this branch of the case, the only material difference being that in that case the evidence, while sufficient to justify a conviction of assault and battery, did not warrant a verdict of guilty of assault with intent to rape, while in the case at bar there was evidence which would authorize a conviction of the latter offense. The principle involved, however, is the same in both cases. In the case cited it was held, that the mere solicitation by a man of a woman to go with him into the woods, though intended as a proposal to her to have sexual intercourse with him, will not warrant a conviction of an assault with intent to rape, when it is manifest that there was no intention at the time to then have carnal knowledge of the woman forcibly and against her will; and that "it was, on the trial of an indictment for this offense, erroneous, upon such a state of facts as

that above recited, to restrict the jury to a finding of 'guilty or not guilty,' and thus, in effect, withhold from their consideration any question of returning a verdict finding the accused guilty of an assault and battery." The trial judge should be careful to instruct the jury as to the law of every offense involved in the charge made by the indictment, where, under any view of the evidence, the accused might be lawfully convicted of such an offense; and he should be equally careful not to charge as to any offense not involved in the evidence. *Jordan v. State*, 117 Ga. 405. In the case at bar, it is true, the court below did not in so many words instruct the jury that they must find the accused either guilty or not guilty, but his entire charge was such as to leave them no alternative to find any intermediate verdict. That this was harmful to the accused seems to be evidenced by the verdict actually returned; for the recommendation to "extreme mercy" does not indicate a strong conviction in the minds of the jury that the accused was guilty of the very grave crime of assault with intent to rape. On the contrary, it lends much strength to the contention of counsel for the accused, that, had the proper latitude been allowed them, they would have found the accused guilty of a less serious offense than the one with which he was charged.

The motion for a new trial contains several other grounds, but none of them disclose error of sufficient importance to require, of themselves, the grant of a new trial. The requests to charge, so far as legal and pertinent, were covered by the charge as given, and the charges complained of were, in the main, correct statements of the law. The charge that the jury might consider in whose power the woman alleged to have been assaulted was, at the time of the occurrence under investigation, is subject to the criticism made on it by counsel for the plaintiff in error, that it was capable of the construction that the trial judge entertained an opinion that she was in the power of the accused; but it can hardly be held to be argumentative to the extent that it will require a new trial; and doubtless when the case is heard again the trial judge will be more guarded in his expressions. The judgment is reversed solely on account of the failure to charge the law of assault and assault and battery.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

JONES *v.* THE STATE.

1. The act approved December 16, 1895 (Acts 1895, p. 257), had the effect to reincorporate what had formerly been the town of Moultrie as the City of Moultrie; and a writ of error from the city court of that city will not be dismissed on the ground that the act creating that court, which was approved November 13, 1901, was passed before the passage of the act approved November 20, 1901, granting a new charter to the City of Moultrie.
2. On the trial of an indictment for a misdemeanor, counsel are entitled as a matter of right to thirty minutes for each side for argument; and it is error for the court to limit the argument to a shorter time.
3. It was improper for the solicitor to say, in his argument to the jury: "I know defendant was guilty, or he would not have fled," there being no evidence of flight in the case; and the court should either have instructed the jury to disregard such argument, or else have granted an appropriate motion for a mistrial.
4. It was error in the present case for the court to charge the jury that flight might be considered as a circumstance of guilt, for the reason that the agreed brief of evidence in the record fails to show anything upon which to base such a charge.

Submitted April 17, — Decided June 13, 1905.

Accusation of larceny. Before Judge Humphreys. City court of Moultrie. February 27, 1905.

Walter A. Way and *James Humphreys*, for plaintiff in error.
T. W. Mattox, solicitor, contra.

CANDLER, J. 1. By an act approved December 27, 1890 (Acts 1890-1891, Vol. II, p. 575), the General Assembly incorporated the town of Moultrie, in Colquitt county. The act approved December 16, 1895 (Acts 1895, p. 257), purported in its title "to reincorporate the town of Moultrie as the City of Moultrie, to confer additional powers on said corporation, and to codify, amend, and supersede all previous acts incorporating the town of Moultrie, and grant a new charter to said town, under the name of the City of Moultrie." On November 13, 1901, an act was passed establishing the city court of Moultrie, and on November 20, 1901, the General Assembly passed "an act to create a new charter for the City of Moultrie, in the county of Colquitt, and for other purposes." On the call of this case in this court, a motion was made to dismiss the writ of error, "upon the ground that a bill of exceptions will not lie from the city court of Moultrie to this court, because Moultrie had not been made a city prior to the establishment of the

city court therein." It is contended by counsel for the defendant in error, that the act of 1895 did not have the effect to change Moultrie from a town into a city and clothe it with the powers of a city; that not until the passage of the act of November 20, 1901, which was subsequent to the passage of the city-court act, did Moultrie become a city; and that therefore, the court in question having been established in a town and not a city, no writ of error will lie to this court. We can not agree with counsel in this contention. The act of 1895 evinces very plainly the legislative intent that the town of Moultrie shall cease to exist and the City of Moultrie come into being from the date of its passage. The purpose of the act as stated in its title is "to reincorporate the town of Moultrie as the City of Moultrie," etc. The fact that the title also sets forth the intention to "supersede all previous acts incorporating the town of Moultrie, and grant a new charter to *said town*," do not indicate, in our opinion; an intention that the charter is to be granted to it as a town, especially in the face of the express purpose that Moultrie is to be reincorporated as a city. The italicised words were perhaps loosely used but in view of the very evident intention of the act, which throughout is in harmony with its title, this inaccuracy will not be allowed to defeat its purpose.

What we now hold is in no sense in conflict with the decision of this court in the case of *Savannah R. Co. v. Jordan*, 113 Ga. 687. It was there held that "a place once incorporated by an act of the General Assembly as a town will not become one of the cities of this State until there is a legislative enactment expressly declaring that such place is a city; and the mere fact that in different legislative acts referring to such town it is sometimes designated as a 'city' will not make it a municipal corporation of the character indicated by that term." The act of 1895 did not casually and inaccurately refer to Moultrie as a city,—it expressly repealed the act by which it was incorporated as a town, and reincorporated it as a city. It came up to the full measure of the requirement laid down by the decision in the *Jordan* case. See, in this connection, *Sessions v. State*, 115 Ga. 19. It follows that the motion to dismiss the writ of error must be overruled.

2. When the evidence had closed, the court stated that five minutes would be allowed to each side for argument. Counsel for the accused protested, and asked for further time, stating that he could not do justice to his client in the time allowed. The court then stated that ten minutes would be allowed to each side, and counsel for the accused again protested, asking for further time. The court replied: "All right, Major, go ahead, and I will see." Counsel then proceeded with his argument, and, after speaking for eleven and one half minutes, closed, not having been ordered by the court to stop, though the clerk had been instructed to stop him at the end of fifteen minutes. This action of the court is assigned as error, "as it deprived the defendant of the right to have the evidence and issues fully and clearly presented to the jury." In misdemeanor cases, counsel are entitled as a matter of right to thirty minutes for argument. Civil Code, § 5637. Upon a proper showing it is error to refuse to extend this time. *Chance v. State*, 97 Ga., 346. Certainly, then, any limitation which curtails the time allowed for argument to less than thirty minutes is cause for a new trial. Nor can it be said that the fact that counsel closed his argument in less than twelve minutes is evidence that his client was not injured by the improper limitation put upon him. Naturally, the knowledge that he would be required to stop speaking at the end of fifteen minutes would lead him to hasten through his argument, so as to cover as much ground as possible. We are clear that the ground of the motion now under discussion was well taken, and that a new trial should have been granted.

3. The solicitor, in his argument to the jury, made use of the following language: "I know defendant was guilty, or he would not have fled from Mr. Hartsfield at Norman Park." Thereupon counsel for the accused made a motion for a mistrial on the ground that this was an improper argument, and in his motion for a new trial he assigns as error the refusal to grant a mistrial. There can be no doubt that this argument was improper, and that the motion for a mistrial should have been granted, or the solicitor rebuked and the jury instructed to disregard such argument. The evidence fails to show flight on the part of the accused, and therefore for the solicitor to

state his knowledge, or opinion, to the jury, based upon what he may have known to be a fact, but which was not proved, was not proper. It is unnecessary for us to discuss this question at length, for Mr. Justice Cobb, in his opinion in the case of *Broznack v. State*, 109 Ga. 514 (3), has fully stated the law in regard thereto. See also 1 Enc. Dig. Ga. Rep. 504.

4. The case made out by the State was substantially as follows: The accused was in the employment of the proprietor of a cleaning and pressing room in Moultrie. One Hartsfield sent his overcoat to the establishment to be cleaned and pressed. Two or three days before this time there was a pair of kid gloves in one of the pockets of the overcoat, but shortly after the coat was returned Hartsfield missed the gloves. When the overcoat was sent to the pressing room, the proprietor turned it over to the accused to clean and press, while he went out on other business. When he returned he saw a pair of kid gloves on the dresser, and asked the accused where they came from; to which the accused replied that he had found them on the street. The accused remained in his employ but a short time after — just how long the evidence does not disclose. Some three or four weeks after getting his overcoat back from the presser, Hartsfield was at Norman Park, in Colquitt county, and hired a team to go a little way into the country. The accused was sent to drive the team, and while driving he wore gloves which Hartsfield recognized and identified as the gloves which had been in his overcoat pocket just prior to the time the coat was sent to the cleaner. Hartsfield told the accused that they were his gloves, and that he ought to charge him ten dollars for them; but that if the accused would pay him \$2.50, he would not prosecute him. "He agreed," says Hartsfield in his testimony, "to pay me on his return to Norman Park, but he never did, although I waited where he told me, and he did not come back to me and pay me for the gloves." The accused offered no evidence. The court charged the jury as follows: "You take the evidence in this case as given by the witnesses, and determine his guilt or innocence. You may consider all the evidence. The court charges you that flight may be considered as a circumstance of guilt." We are clear that the latter part of this charge was error, for the reason that there was nothing that could in any way be distorted into evidence of flight on the part

of the accused. The fact that he left the employment of the proprietor of the cleaning and pressing room shortly after Hartsfield's overcoat was sent there to be cleaned and pressed certainly did not constitute a flight, especially in view of the fact that there is nothing in the evidence to indicate the length of the interval between these two occurrences. Nor was the failure of the accused to keep his promise to pay Hartsfield for the gloves in any sense a flight. The charge referred to was necessarily harmful to the accused in its tendency, and was cause for a new trial.

The remaining grounds of the motion are without merit. Those which we have discussed, however, constrain us to reverse the judgment refusing a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

SPENCER v. THE STATE.

EVANS, J. 1. While an indictment which charges that an offense was committed on a day subsequent to the finding of the bill is open to special demurrer before pleading to the merits, the defect in the indictment can not be taken advantage of after verdict. *Adkins v. State*, 103 Ga. 5, and cases cited.

2. Though the evidence upon which the State relied for a conviction was not altogether satisfactory, it was sufficient to authorize the jury to find the accused guilty of the offense with which he was charged.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 15, — Decided June 13, 1905.

Accusation of larceny. Before Judge Harwell. City court of LaGrange. March 25, 1905.

E. T. Moon, for plaintiff in error.

Henry Reeves, solicitor, contra.

TAYLOR v. THE STATE.

1. While the strict rules of the common law in regard to indictments have been modified in this State, yet, in an indictment for forging or fraudulently altering a teacher's license, it is necessary to set out the material parts thereof; and it is not sufficient to describe the instrument merely by calling it a license, and stating as a legal conclusion that it authorized the holder to teach in the public schools of the State and to receive pay therefor.

2. None of the grounds of the demurrer except that which makes the point just referred to were meritorious, and they were properly overruled.

Argued May 15,—Decided June 13, 1905.

Indictment for altering teacher's license. Before Judge Holden. Hart superior court. March 23, 1905.

A. S. Taylor was indicted, in the superior court of Hart county, for the offense of falsely and fraudulently altering a teacher's license. The indictment was demurred to. The demurrer was overruled, and the defendant excepted. On the argument in the Supreme Court it was suggested that the copy of the indictment sent up with the record contained certain errors, and under order of the court another copy was certified and filed. The body of the indictment was as follows: "The grand jurors . . . charge and accuse A. S. Taylor with the offense of felony; for that the said A. S. Taylor did, on the 1st day of January, 1904, in the county aforesaid, with force and arms, with intent to defraud said county of Hart in said State of Georgia, falsely and fraudulently alter a license issued by E. Benton, county school commissioner of Bryan county, Georgia, to A. S. Taylor, a teacher, the same being what is commonly known as a license, which authorizes a teacher to contract with the proper officers to teach in the public schools of said State, and authorizing the holder of such license to be paid for such teaching out of the public-school fund, said license as originally issued being for what is known as third grade, authorizing the holder thereof, the person to whom issued, to be contracted with to teach in the public schools in which he may be employed, for a term of one year from date of issue, the date appearing on said license in the face thereof as the date of issue being July 1st, 1904, the said alterations so made by said A. S. Taylor being the altering the word 'third,' originally appearing before the word 'grade' in said license, so as to make it read 'first,' and said license at that part thereof to read 'first grade,' and altering the word 'one' before the word 'years' in said license so as to make it read 'three,' and thus making said license when so altered read at that part thereof 'three years,' and by altering said date appearing in the face of said license as the date of issue of the same, which was originally July 1st, 1904, so that, after said alteration so then and there made by said A. S.

Taylor, said license read, in that part of said license, July 1st, 1903, teachers of third-grade license being authorized to teach thereunder only one year from date thereof so as to receive pay from public-school fund received in said county of Hart less pay for time taught than persons holding first-grade license authorizing them to teach three years from date of said license, said alterations being so made by said A. S. Taylor with intent to procure more money from the public-school fund of the said county of Hart, for teaching in the public schools therein, than said Taylor would have been authorized to receive under said license as the same was originally issued, thus with the intent to so defraud said county of Hart."

A. G. & Julian McCurry, for plaintiff in error.

D. W. Meadow, solicitor-general, contra.

LUMPKIN, J. The demurrer in this case contains twelve grounds, but several of them make substantially the same point. It is contended, that the indictment states no legal offense; that it does not set out the license alleged to have been fraudulently altered; that it is not shown that the defendant made any attempt to use the license alleged to have been altered, to defraud the county, or how it was intended to defraud the county, or that he attempted to teach school in Hart county, or to draw public funds thereof; that no authority is shown in the county school commissioner, who issued the license, to do so; that it does not show clearly that the holder of a first-grade license had any more right than one holding a third-grade license, or was entitled to receive more pay, or was paid more in Hart county; that the license was not good in Hart county without being endorsed by the county school commissioner of that county; and it was not shown that there was any intent to induce him to endorse it, or that the defendant altered it with intent to induce the public-school authorities of Hart county to contract with him or authorize him to teach school; and that the county of Hart was not alleged to be a corporation.

We do not think there is merit in any of the grounds of the demurrer, except one. The indictment was based on the act of December 18, 1900 (Acts 1900, p. 69; Van Epps' Code Supp. § 6675). Under that act it is criminal to falsely and fraudulently forge or alter "any certificate or license issued by any county

school commissioner of this State," with intent to defraud the State or any county thereof. It is not necessary to allege the authority of the commissioner to issue the license, or the details of the manner in which the defendant intends to defraud the county, or that he has actually committed a fraud, or attempted to do so by overt acts. *Travis v. State*, 83 Ga. 372; *Shope v. State*, 106 Ga. 226. The courts will take judicial cognizance of the fact that each county is a body corporate. Pol. Code, § 340; Civil Code, § 5148.

At common law, as a general proposition, when a written instrument formed a part of the gist of the offense charged, it was required to be set out verbatim, unless where a statute declared that it was not necessary. An instrument charged to be forged was not required to be set out verbatim, where it was lost or destroyed, or in the defendant's possession, or where access to it could not be had; in which event the disabling fact could be alleged, and the substance set out. 2 Bish. Crim. Proc. (4th ed.) §§ 401, 403, 404, 419; 1 Barb. Crim. L. 334; 2 McLain's Crim. L. §§ 794, 796; Whar. Crim. P. & P. (9th ed.) §§ 167, 180. One of the principal reasons given by the last-named author for the necessity for particularity in criminal pleading is, "to enable the defendant to prepare for his defense in particular cases, and to plead in all; or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true) so support the conclusion in law as to render it necessary for him to make any answer to the charge." § 166 (d). In England and in some of the United States there have been special legislative enactments on the subject. *Id.* § 412. But in the absence of statutory enactment, the general rule requires that there should be such a setting out of at least the material parts of the paper alleged to be forged or altered as would put the defendant upon notice of its contents. The exceptions need not be mentioned. In this State the niceties and technicalities required in indictments at common law have been largely swept away. Penal Code, § 929, *supra*; *Studstill v. State*, 7 Ga. 2; *Berry v. State*, 10 Ga. 517; *Stephens v. State*, 11 Ga. 240. In *Johnson v. State*, 90 Ga. 444, it is said that, "In our judgment, the section of our code above cited was not intended to dispense with the substance of good pleading. It simply means that an in-

dictment conforming substantially to its requirements will be sufficient, but it is not designed to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial." In *Haupt v. State*, 108 Ga. 53, it is said that "While in an indictment for forgery only the material parts of the instrument, as a contract, are required to be set out," etc., thus recognizing the necessity for putting the defendant on notice of the material parts of the instrument alleged to have been forged or altered. It is not sufficient for the indictment to state conclusions or inferences in regard to the legal effect of the instrument. The decision in *Watson v. State*, 78 Ga. 349, was not based on a charge of forging or altering an instrument.

The indictment under consideration describes the instrument alleged to have been altered as being "what is commonly known as a license which authorizes a teacher to contract with the proper officers to teach in the public schools of said State, and authorizing the holder of such license to be paid for such teaching out of the public-school fund." In the latter part of the indictment occur the following words: "teachers of third grade license being authorized to teach thereunder only one year from date thereof so as to receive pay from public-school fund received in said county of Hart less pay for time taught than persons holding first-grade license authorizing them to teach three years from date of said license." Neither of these expressions contains any sufficient description or setting forth of the instrument, but rather a mere opinion of the grand jury or the solicitor-general as to the result or legal effect of it. In the body of the indictment certain words forming part of the instrument are alleged to have been altered. They do not appear to have been consecutive words, but to have occurred at different places in the license. It is impracticable from an inspection of the indictment to learn what were the contents of the whole paper or of a substantial part thereof.

The ground of the demurrer to the effect that the writing or paper alleged to have been fraudulently altered was not sufficiently set forth in the indictment should have been sustained. The other grounds were properly overruled.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

WILLIAMS v. THE STATE.

1. If the corpus delicti and the guilt of the defendant are both proved as the law requires, it will not furnish ground for a new trial that the court did not require the evidence to be so introduced as to divide it into two distinct parts, the first referring to the corpus delicti, and the second to the defendant's connection with the crime.
2. A letter written by one accused of a crime, a day or two after its commission, and containing statements favorable to himself, is not admissible in his own behalf.
3. Alibi, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission.
4. Where a defendant was charged with committing murder by administering poison evidence introduced for the purpose of proving that he was not present at the time and place when the State contended that he bought the poison, was proper for consideration under the plea of not guilty, but did not set up a distinct defense of alibi.
5. Where counsel for the defendant began to make objection to certain evidence, but the court interrupted him by saying that he could bring out on cross-examination that the testimony was improper, and it did not appear that the objection was ever completed, or the grounds stated, or any subsequent motion to rule out the evidence made, this furnishes no ground of a motion for a new trial.
6. Where the court properly charged the jury on the subject of reasonable doubt, a request to charge that a particular fact sought to be shown by the defense could create a reasonable doubt in the mind of the jury, was rightly refused.
7. After charging that, in order to convict upon circumstantial evidence, the proof must exclude every reasonable hypothesis except that of guilt, there was no error in refusing a request to give a charge which added that this rule should never be relaxed in a case involving life, or imprisonment for life.
8. There was no error in refusing to charge that the jury were to consider the evidence of expert witnesses as they did that which fell from the lips of other witnesses, and that the law permitted them to believe it in preference to other evidence, if there was conflict between the two; the request to charge leaving out of view any consideration of the credibility of the witnesses themselves or their opportunity for knowing the facts to which they testified, or the nature of such facts.
9. The verdict was sustained by the evidence, and there was no error in refusing a new trial.

Argued May 15, — Decided June 13, 1905

Indictment for murder. Before Judge Hammond. Richmond superior court. March 25, 1905.

Neal Williams, colored, was indicted for the murder of Mattie Bell Devine. He was convicted and sentenced to imprisonment for life. He moved for a new trial, which was denied, and he ex-

cepted. The evidence on behalf of the State was, in brief, as follows: The defendant and deceased lived together in adultery. They sometimes quarreled, and had mutually cursed each other. About a week before the death of the woman, they had a quarrel, and she told him to leave. He said when he left he would leave somebody sick or dead. Several days after this, on Sunday, he went to a drug-store and bought a box of poison known as "rough on rats." He inquired if it would dissolve in water or whisky, and aroused the suspicion of the clerk, so that the latter desired to retake the poison, but the druggist told the clerk to let him have it. Defendant in making the purchase gave a fictitious name, claiming that his name was Charlie Hill. He left on Monday, going from Augusta to Charleston, S. C. On the day he left he broke up some furniture in the home belonging to the deceased, and cut the mattresses. The woman was taken sick Monday night, and died Tuesday night. She became sick after eating supper. Her brother, who also ate there, became sick shortly afterwards. Both exhibited symptoms of arsenic poisoning. An antidote was administered to the brother, and he recovered. The morning after her death a box partly filled with "rough on rats" was found on a sill over the door. A bucket in the house containing flour exhibited signs of having something mixed in it which appeared to be a powder differing in color from the flour. This flour and some biscuits which had been cooked by the deceased were examined by a chemical test and found to contain arsenic. The witness who so testified stated, on cross-examination, that the test used would show the presence of arsenic or antimony; that the analysis was not carried further to differentiate between arsenic and antimony, for the reason that both of them are irritant poisons, and antimony is not contained in "rough on rats," which is mainly composed of arsenic. The stomach of the woman was taken out and afterwards examined, but no arsenic was found in it. It had certain red splotches or spots upon it which one of the witnesses testified might have been the result of an irritant. A physician testified on this subject as follows: "Upon opening the stomach itself, we found that the mucous membrane was somewhat softened in appearance and that there were one or two large reddened spots upon the mucous-membrane lining. Those reddened spots could have been produced by any

irritant, or by some of this powder, "rough on rats." The effect of an irritant poison is to cause violent vomiting and purging. Arsenic is an irritant poison. It would be absorbed or eliminated by the system after it had remained in the stomach some time; it is not a cumulative poison; it is rapidly eliminated. It may stay sometimes, but it can be, and is frequently, rapidly eliminated. Where it is eliminated by absorption and by vomiting, there are cases on record where the stomach showed absolutely no signs of it at all. Where signs of it are left, those signs are the reddened spots I have spoken of, and possibly a reddened spot would give the appearance of an actual burn, but certainly the most characteristic finding would be these reddened areas. I wrote on her death certificate 'arsenic poison;' it was, in my opinion, the cause of her death."

A negro woman testified that the defendant had asked her, on Sunday, if she had any concentrated lye, or any rat poison, saying that he had two old cats that drank out of his water bucket. Another testified that he applied to her for strychnine on Sunday evening. Another testified, that on Monday the deceased and herself were walking on the street, when the defendant came up and obtained from the deceased a key to the house where they were living; that when the witness went back to the house the defendant was gone, the door locked, and the key in the door; that the defendant and the deceased had a fuss on the Tuesday preceding, and that he said he was going to kill her before he got off. Another witness testified that the defendant applied to her for some "red-seal lye," saying that he wanted to kill two old black cats; but she fixed the time of the application as being on Monday. The defendant was arrested in Charleston and brought back to Augusta. There was other evidence, which it is not necessary to set out in detail.

Oswell R. Eve, for plaintiff in error. *John C. Hart*, attorney-general, and *J. S. Reynolds*, solicitor-general, contra.

LUMPKIN, J. (After stating the facts.) 1. Counsel for defendant objected to the introduction of any evidence against the accused until the corpus delicti had first been proved by the State. There was no error in overruling this objection. The order in which evidence is allowed to be introduced must rest, to a considerable extent, in the sound discretion of the presiding

judge. Sometimes the corpus delicti may be proved separately, and evidence tending to connect the accused with the offense produced afterwards. In other cases proof of the corpus delicti and of the connection of the defendant with it is so interwoven as to be practically inseparable in the introduction of evidence. Thus if a defendant were charged with murder by shooting another, it would be difficult to prove the homicide as an independent fact before showing that the defendant was the perpetrator. If the corpus delicti and the guilt of the defendant are both proved as the law requires, it will not furnish him any ground for complaint that the evidence did not separate the case into two distinct parts and refer to each separately.

2. A letter was offered in evidence which had been written by the defendant from Charleston, a day or two after the woman's death, to a witness sworn in his behalf who resided at Augusta, telling of his arrival in Charleston and his compliance with a request previously made by the witness, explaining why he had gone to Charleston on "the former" excursion, and requesting the witness to address a reply to him at that point. This was properly rejected by the court. It amounted to offering declarations of the defendant in his own favor, forming no part of the *res gestæ*, or, as it is sometimes expressed, self-serving declarations. *Dixon v. State*, 116 Ga. 186; *Boston v. State*, 94 Ga. 590.

3, 4. Complaint is made that the court charged that the defendant set up the plea of alibi, besides that of not guilty, and defined alibi to mean absence from the scene of the alleged crime at the time of its commission, thus making it impossible for him to have perpetrated it. The court gave a correct definition of the defense of alibi, and correctly applied it. Penal Code, § 992. The contention made by counsel for defendant is that the alibi sought to be shown by him was that he was at a different place at the time when the State endeavored to prove that he purchased poison. This would not be a defense of alibi, but merely evidence conflicting with some of that introduced by the State, and would be for the consideration of the jury under the plea of not guilty. The court did not err, therefore, in failing to charge upon this contention of the defendant as if it were a plea of alibi.

5. Objection was made to allowing a witness to testify that he

saw the bread, some of which he was told the deceased had eaten. As appears in the motion for new trial, however, the ground of objection was not stated. The court and counsel had a colloquy, which resulted in the evidence remaining in, the court saying that counsel could show its impropriety on cross-examination. This court can not pass on the alleged error without having before it the ground of objection made to the evidence at the time when it was offered. As to not ruling it out later; see *Stone v. State*, 118 Ga. 705 (9); *Cawthon v. State*, 119 Ga. 396.

6. It is contended that the court erred in refusing a request to give the following charge: "I charge you that the failure to find arsenic in the stomach of the deceased could create a reasonable doubt in your mind as to the guilt of the accused; and if that doubt is with you, you can not convict the accused." This request was properly refused. It singled out a particular piece of evidence and sought to have the jury instructed, in effect, that it could be sufficient to create a reasonable doubt in their minds. The charge fairly instructed the jury on the subject of reasonable doubt. *McDuffie v. State*, 90 Ga. 786; *Delk v. State*, 92 Ga. 453.

7. The rule that, in order to convict upon circumstantial evidence, the proof must exclude every reasonable hypothesis except that of guilt, was given in charge by the court. Defendant's counsel made a request to charge, which was a substantial repetition of the charge given, with the added clause, "and this rule should never be relaxed in a case involving life, or imprisonment for life." This was a purely argumentative addition to the rule of law, and was rightly refused by the court. The use of language of this character by a Justice of the Supreme Court in discussing the facts of a particular case (*Martin v. State*, 38 Ga. 295), does not necessarily render it proper for use by a judge of a trial court in charging the jury. *Atlanta & West Point R. Co. v. Hudson*, ante, 108.

8. Error was alleged because the court declined to give the following request to charge: "I charge you that you are to consider the evidence of expert witnesses as you do that which falls from the lips of other witnesses. The law permits you to believe it in preference to the other evidence, if there is a conflict between the two." The court left the jury to determine the weight of the evidence, and properly refused this request. In

it the credibility of the witnesses themselves was entirely left out of view, as well as their opportunity for knowing the facts to which they testified, and the nature of such facts. That a witness may be an expert does not furnish ground for disbelieving him, but his evidence is to be weighed by the jury; and the rules applicable to determining the weight to be given other evidence are also applicable as to experts. *Merritt v. State*, 107 Ga. 676 (4); *Ryder v. State*, 100 Ga. 529 (6).

9. The verdict was sustained by the evidence, and there was no error requiring a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

McCOY v. THE STATE.

Where on a trial for simple larceny the evidence authorized a finding that, even if the accused did not steal the property in the county alleged in the indictment, he carried the stolen property into that county before the indictment was found, the venue was sufficiently proved.

Argued May 15, — Decided June 13, 1905.

Indictment for larceny. Before Judge Henry. Walker superior court. March 28, 1905.

Payne & Payne, for plaintiff in error.

W. H. Ennis, solicitor-general, contra.

FISH, P. J. J. R. McCoy was indicted for the offense of simple larceny, for stealing, in the county of Walker, a cow and calf belonging to J. M. Millwood, the prosecutor. On the trial Millwood testified, that on the night of December 5, 1904, he lost the cow and calf described in the indictment, and that he found them about two weeks later in the possession of Miss Gossatt, who lived some distance from his house but in the same county, Walker. On cross-examination he testified as follows: "I live within a half or three-quarters of a mile from the Tennessee line. After my wife milked that night, my cow and calf were on the outside of any inclosure, and could go where they pleased. The cow had a bell on her, and I heard her going down the road towards Rossville, but I did not hear her after she passed Rossville. She went up Spring street in Rossville, where the Baptist

Church is located. . . She was up in there somewhere. I don't think she was on top of the hill, but she was in there somewhere about the Baptist church, still traveling, and I suppose the calf was with her. . . The Baptist church is somewhere close to the Tennessee and Georgia line. . . I don't know where the line is. I don't think she was in Tennessee, but I don't know where the line is exactly, but it is somewhere in the neighborhood of where I last heard the cow, and of course I could not say for certain whether she was in Tennessee or Georgia. When I last heard her, if she was not in Tennessee, she was right at the line and going in that direction. . . It was a little after dark when I heard her going off. I generally kept her in a pasture, and I don't know where she went when she got out. There was not much grazing on the hill where I last heard her, nor until you get beyond there in the open common, and there it is very short, but there is open common beyond the hill, and that is in Tennessee. My cow did not often graze there. I kept her about home most of the time. . . Where I found the cow on Lookout Mountain was in this county, and this was on the 2d day of January. . . She did not often graze up there, only occasionally, or a few times. . . The cow was raised on the Georgia side, and generally grazed on the Georgia side." Miss Gossatt testified that she bought the cow and calf of the accused in the forenoon of December 6, 1904, at which time he came to her home with the cattle and said that he owned a farm near Trenton, that he had raised the cow, and desired to sell her in order to get money with which to pay his taxes. She further testified that Millwood came to her house and recovered his property. McCoy said in his statement that he bought the cow and calf in Chattanooga, and introduced one witness who swore that she had seen him buy a cow and calf from a man unknown to her, on the streets of Chattanooga, on December 6, 1904. The jury returned a verdict of guilty. The accused made a motion for a new trial, upon the general grounds that the verdict was contrary to law and the evidence and without evidence to support it. The motion was overruled, and he excepted.

The main contention of the accused before this court is that the venue of the crime was not proved, in that it was not shown

positively that the animals were stolen in Walker county. It is well established that the venue of a criminal case may be shown not only by positive testimony, but also by circumstances. *Key v. State*, 112 Ga. 399, and citations. The evidence in behalf of the State was positive that the stolen cattle were raised in Walker county and were in the habit of grazing within its limits, and there was probably sufficient evidence to authorize the jury to infer that the cattle were actually stolen in that county. When last heard by the prosecutor on the night of December 5, the cattle were in Walker county, and when next seen on the following morning in the possession of the accused they were in Walker county still. He sold them in Walker county, and there they have remained. Be that as it may, however, the fact of the stolen cattle being in the possession of the accused in Walker county on the morning after they were stolen would certainly give the court of that county jurisdiction. The Penal Code, which declares that cattle stealing shall be denominated simple larceny, after defining that offense (§155) says, "The thief may be indicted in any county in which he may carry the goods stolen." "The crime is regarded as completely committed, in all its parts, in each county." *Tipps v. State*, 14 Ga. 422. So even if it were not positively shown that the accused did actually drive the cow and calf away from the custody of the prosecutor whilst they were grazing within the limits of Walker county, the fact of the accused being unlawfully in possession of the stolen property in that county was sufficient to give the court of that county jurisdiction.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

HORTON v. THE STATE.

- Cobb, J. 1. It is not error to allow a witness to deliver his testimony in narrative form, without the aid of questions from counsel, when counsel so request, provided the witness is not permitted to state anything which is inadmissible as evidence. This practice is rather to be commended than condemned.
2. The evidence, although circumstantial, and not entirely satisfactory, was sufficient to warrant the verdict, and the discretion of the judge, exercised in overruling the certiorari, will not be controlled.

3. There was no error requiring a reversal of the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 15, — Decided June 13, 1905.

Certiorari. Before Judge Holden. Hancock superior court.
March 31, 1905.

R. H. Lewis, for plaintiff in error.

D. W. Meadow, solicitor-general, contra.

ROBERTS v. THE STATE.

1. The evidence fully authorized the jury to find that the deceased was murdered, that the accused was the murderer, and that the defense of insanity was not sustained.
2. The circumstances tending to show that the deceased was killed with the instrument named in the indictment were sufficient to warrant the jury in finding that this charge was sustained.
3. When the body of a woman alleged to have been murdered was found upon a bed in a room of the house which she occupied as a dwelling, with the head crushed in two places, in such a manner as to indicate that the fatal wounds were inflicted with some blunt, smooth, and round instrument, which crushed the skull without breaking the skin, such as a pole or piece of iron piping, and, shortly after the discovery of the body, bloody bed-clothes were found behind a cot in the same room, and a curtain pole fractured about the middle, the breaks appearing to be fresh, was found behind a trunk in an adjoining room, such pole, upon being identified by witnesses who so found it, was admissible in evidence upon the trial of the person charged with the murder.
4. When the facts above indicated were shown by the evidence and the pole was introduced, the solicitor-general had the right, in his argument to the jury, to contend that this pole was the weapon used by the murderer.
5. When a husband is on trial for the alleged murder of his wife, evidence tending to show a long course of ill-treatment and cruelty on his part toward her, continuing until shortly before the homicide, is admissible. Such evidence tends to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife.
6. The testimony of a witness that, on a given occasion, a particular person appeared to be excited, or did not so appear, is not subject to objection upon the ground that it is a mere opinion or conclusion of the witness, and therefore inadmissible.
7. Upon the trial of a criminal case, it is not error for the judge to shape his general charge to the jury upon the evidence alone; but he should, at some stage of the charge, appropriately instruct the jury with reference to the prisoner's statement.
8. The trial judge fully instructed the jury in reference to the law applicable to the defense of insanity and the amount of mental capacity necessary to commit the crime charged, and did not err in failing to repeat the charge

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upon the subject of such mental capacity, in immediate connection with his instruction that if the jury should find that the accused took the life of the deceased as charged, and was at the time of such mental unsoundness as to be incapable of committing a crime, they should acquit him.

9. There was no error in refusing to charge that the defendant had introduced evidence of his insanity at the time the alleged offense was committed, and that if the jury believed, from a preponderance of the evidence, that at the time of the alleged offense the accused was insane, they should acquit him.
10. The fact that the solicitor-general, after asking a witness for the accused if he had not, during the course of his examination, made a certain statement, and eliciting from the witness the reply that he had not, said to the witness, in the hearing of the jury, "I say that you did," is not cause for a new trial, although the statement of the prosecuting officer was objected to at the time and the court failed to rebuke his improper conduct; as the jury, having heard all the testimony of the witness, were not at all likely to be misled by such statement, and the particular question about which the dispute arose was immaterial.

Argued May 16, — Decided June 13, 1905.

Indictment for murder. Before Judge Henry. Walker superior court. March 29, 1905.

Roberts was indicted for the murder of his wife, and upon his trial, in February of the present year, he was convicted upon evidence which was wholly circumstantial. He made a motion for a new trial, which was overruled, and he excepted. The grounds of the motion were: (1-3) That the verdict was contrary to the law and the evidence and without evidence to support it. (4) Because the indictment charged that the offense was committed by striking the deceased with a curtain pole, and the evidence wholly failed to show that it was committed in this way. (5) Because the verdict was strongly against the weight of the evidence introduced to show the insanity of the accused at the time the alleged crime was committed. (6) Because the evidence clearly showed that at the time of the homicide the accused was of such unsoundness of mind as to be incapable of forming a criminal intent. (7) Because J. S. Wilson was permitted, over the objection of the defendant, to testify as follows: "On New Year's morning I passed Mr. Roberts's home. He was in the house and seemed to be going from one part of the house to the other. He was saying 'God damn' something or other. I didn't understand what names he used. I didn't understand very much. He was talking to his wife; I

heard her say 'Papa' a time or two. That was all I heard her say." (8) Because this witness was allowed to testify: "He (defendant) did not appear to be excited when he came to me in the woods. After I got back from Chattanooga he appeared to be excited. That was both before and after his children came." (9) Because the court permitted J. P. Tucker to testify: "I don't know whether he (defendant) appeared to be excited or not when I got there (to his house); he seemed to be in trouble or something, he was taking on a great deal about it." (10) Because the following evidence of Mrs. DeWitte was illegally admitted: "Last summer I heard Mr. Roberts call his wife an old bitch. I guess that is about all I heard. Mr. Roberts was sitting at the east side of the house and Mrs. Roberts was sitting on the ground by a tree when he called her that. I saw Mr. Roberts hit his wife on the day before Thanksgiving, last November, with what looked like a piece of board. I reckon he was angry, or he would not have hit her. I heard Mrs. Roberts scream. I was in my yard, and I saw Mr. Roberts drag her from the north end of the house to the west of the porch, and he struck her just as she went on the porch. She was running at the time, and he was after her. She was screaming; that is what attracted my attention. He struck her awful hard. I heard the lick. He struck her once." (11) Because "a curtain pole, shivered about the middle, which had been identified by witness W. H. Henderson as a pole found in defendant's house, in an adjoining room from that in which the remains of deceased lay, behind a trunk, the day after the homicide, and which was offered in evidence by the State after the defendant had closed his testimony, was illegally admitted" in evidence. (12) Because the following testimony of Miss Lollie Roberts, who testified in rebuttal for the State, was illegally admitted: "My father (defendant) would call her (deceased) a bitch and a bastard, and would always be constantly calling her some words like that. This was frequently during the time I lived at home (prior to 1903). He would call her a damn bastard and a damn bitch. I have heard him use such words ever since I can remember, to my mother. He would come in and be angry about something on the street, and come in cursing and drinking. For instance, if he would speak to her and she did not hear him, he would curse her. If he would be

talking to her and she would be speaking to one of us and not hear him, it would make him mad and he would curse her then. When he came back from Georgia (in October, 1903), we heard our mother screaming in the side room, and I went in there and saw her on the floor, and he was standing over her with a knife in his hands. When he first saw me, he pushed me over her and I pushed him back, and I started to help her up and he came at me with the knife, and I pushed him again and the knife dropped, and when I pushed him again a second time he fell. She was on the floor, with her nose bleeding, and he had the knife in his hands striking at her. I can't remember exactly what my mother said at the time. I just remember her saying, 'Please, Papa, don't kill me,' and then I heard her call my name to come to her. This was when we lived on Catherine street, before we moved. When he was cursing her he would dare her to answer him back, and when she answered him I have heard him say he would beat her brains out with the poker that he had, or anything that he would have in his hands. He would beat her brains out if she would answer him. I have heard this on more than one occasion. He wouldn't always have the same thing in his hands, and it wouldn't be the same reason, but I have heard him threaten her life several times. He would dare her to go to my sister's house, and I have heard him tell her if she went over there he would kill her. On one occasion—I can't remember exactly when it was, but I remember the time—he was drinking, and I persuaded my mother to come into the front room where I slept, and I tied the door to keep him out, and he beat on the door and we couldn't get to sleep for him, but we wasn't so afraid of him. He went to the little house where his shotgun was and stood out in the door of the little house, and from there would go from the back door to the front door and would dare any one to open the door; he said that he would shoot the person that opened the door. He stayed there all night. My mother laid down in the room with us, and as soon as it began to get day we went out the back way, and I opened the dining-room door a little way to see if I could see him, and he pointed the gun then and would have shot if I had not shut the door. He was out on the sidewalk and saw me open the door. This occurred two or three years ago. He was always drunk

when he would curse and abuse mother. I have had him arrested several times when he would be cursing and abusing her. He has always treated my mother this way. When he would be sober I have known him not to be kind. Sometime in the night I heard her screaming, and I went in there and he was beating her with a stick, and I had seen him abuse her so often before that."

(13) Because the court erred in charging the jury: "The defendant is presumed to be innocent, and that presumption enters the trial with him and entitles him to an acquittal at your hands, unless the evidence has legally and satisfactorily established his guilt."

(14) Because the court erred in charging the jury: "It is your duty, gentlemen, to weigh and consider all of the evidence of every kind bearing on all of the issues and every issue in the case, in determining finally whether the defendant's guilt is established in the case to the requisite degree of certainty that I have explained to you, that is, beyond a reasonable doubt, or not. If, after weighing all of the evidence, you are satisfied to a reasonable and moral certainty and beyond a reasonable doubt that the defendant is guilty, you ought to convict him. But if, after weighing it all and considering it all, you are not so satisfied, you should acquit him."

(15) Because the court erred in charging the jury: "If, on the other hand, you do not find it established to the requisite degree of certainty that he (defendant) took her (deceased's) life as charged, or if you find that he did take her life, and find that at the time he was of such mental unsoundness as to be incapable of committing crime, and therefore irresponsible for an act which, if committed by a sane man, would be a crime, then you ought to acquit him."

(16) Because the court refused, upon request therefor in writing, to charge the jury as follows: "The defendant in this case has also introduced evidence of his insanity at the time the alleged offense was committed. Proof of insanity is a complete defense to homicide. The burden of this proof is on the defendant, as all men are presumed to be sane until the contrary is shown. The defendant, however, does not have to show his insanity beyond a reasonable doubt, but only by a preponderance of the evidence. Therefore, if you find from a preponderance of the evidence that at the time the alleged offense was committed the defendant was insane, then you would be authorized and should acquit him."

(17) Because

during the argument of the solicitor-general he asserted that the pole which had been introduced in evidence was the pole with which the deceased was struck, to which objection was made upon the ground that there was no proof of this, which objection the court overruled. (18) Because during the examination of Lockhart, a witness for the defendant, the following colloquy occurred: "Sol. Gen'l. 'You said that you got down to Roberts's house about eight o'clock.' Ans. 'I didn't.' Sol. Gen'l. 'I say that you did.'" This ground alleges that "Said statement of the solicitor-general [was] improper and prejudicial to the cause of the defendant," and was at the time objected to by the accused, "said objection not being entertained by the court." (19) Because the court erred in permitting the following colloquy between the solicitor-general and this witness: "Sol. Gen'l. 'And you hunted from half past eight o'clock in the morning until three o'clock and never saw a single man?' Ans. 'No, sir, I was in the woods.' Sol. Gen'l. Now wait'— Ans. 'I was hunting birds and things, and not folks.' Sol. Gen. 'The witness can get smart.'" It is alleged that the statement of the prosecuting officer was "improper and calculated to intimidate said witness and to prejudice the cause of this defendant."

T. C. Latimore, T. R. Hudson, and Bale & Shaw, for plaintiff in error. *John C. Hart, attorney-general, W. H. Ennis, solicitor-general, and Payne & Payne*, contra.

FISH, P. J. (After stating the facts as above.) 1. There is no merit in the usual general grounds of the motion for a new trial. The evidence that the wife of the accused had been murdered was clear and convincing, and the circumstances tending to show that he was the perpetrator of the crime were sufficient to exclude every reasonable hypothesis to the contrary. The jury were fully authorized to find that the evidence in reference to the insanity of the accused at the time the crime was committed was not sufficient to sustain this defense.

2-4. The circumstances tending to establish the fact that the deceased was killed with a curtain pole were sufficient to warrant the jury in finding that the charge in the indictment that she was so slain was sustained by the evidence; and there was no error in permitting the State to introduce in evidence the curtain pole re-

ferred to in the motion for a new trial. The evidence showed that at the time when the crime was alleged to have been committed the accused and his wife lived, by themselves, in a little cottage, in Walker county, Georgia, about five or six miles from the city of Chattanooga, Tennessee. Wilson, a witness for the State, who lived in three hundred yards of them, testified, that, between three and half past three o'clock in the afternoon of January 13, of the present year, while he was chopping wood in the forest, about three hundred yards from his own home and about six hundred yards from that of the accused, the accused came to him and said he was in trouble, and, upon Wilson asking him what was the matter, said: "My wife is dead. I went to the spring and came back, and she was dead as the devil. I want you to go to town and let my folks know, and let them come and make arrangements." The witness then went with the accused to his house, and "saw his wife on her back, lying on the bed; she was straightened out, her hands folded across her breast and her eyes closed. She was dead, covered up there with a blanket or comfort." The accused did nothing at the house, except to put his hand up and shake her head and roll it about. "She had on a dress. Defendant said he didn't know how she died, unless she got strangled on snuff." In a few minutes after he came to the witness in the woods, the accused said his wife had been dead about two hours. At the house, the accused threw the blanket back and let it stay back, and the witness saw a little blood on the back of the hand of the deceased. When the defendant came to the witness in the woods, there was a little blood on his face, but no wound or injury there; "it looked like it might have been touched there from being on his hand." The witness did not see any bruises on the body of Mrs. Roberts, except on her hand. "Her hair was down over her forehead, sufficiently to hide any wounds that she might have there, if she had any." The spring is about one hundred and fifty yards from the house of the defendant. The accused did not point out any wounds, or say anything about any wounds. J. P. Tucker testified: "I am coroner of this county. I was at the residence of the defendant, James B. Roberts, on or about the fourteenth day of January last. I was sent for to come and hold an inquest. . . I got there about ten o'clock on the fourteenth, in the daytime." There were some five

or six people there when he arrived, including Mr. Wilson, Mr. DeWitte, and Mr. Roberts's daughters. When he got there Mrs. Roberts's body was in the room, covered up. He made an examination of the body, and found the head crushed; "there were two bruises, one of the bruises was up on the head to the right, one on the head to the left. The skull seemed to be crushed down. . . The skull seemed to be soft, seemed to be mashed down. There was one on her left hand, seemed to be a gash, just like something had struck across; it was a cut." The witness further testified: "I made an examination in the room or about the house for a weapon. We found a curtain pole. [Here a pole was identified by the witness as the one found.] This is a curtain pole that had been used over a window. I found it in the house of Mr. Roberts on the fourteenth day of January, on the day of the inquest. The pole was lying right behind a big trunk. It was not in the room where Mrs. Roberts's body was lying; it was in the room next to Mrs. Roberts. It now appears like it appeared when I found it. It was fractured as it is now, it was broke on both sides that day; they seemed to be fresh breaks then. I saw a towel there that had some blood on it. It was hanging on a nail in the room where she was. I didn't see any blood on the bedclothing. I don't know as I examined the bedclothing at all. I heard Mr. Roberts make a statement about this transaction while I was there. He was intoxicated at the time he made the statement. When I got there, he told me that he had gone down to the spring; he says, 'I went down to the spring and fed my chickens, and when I came back I called to my wife and she didn't answer. I called her to get up,' to get dinner or breakfast, whatever it was, — I believe he said that he asked her to get up and cook something. He said that she didn't answer him, and he went in and saw that there was something wrong; said then he thought probably she had taken too much snuff or something, and he didn't know what to think, and he examined her and saw that she was gone. . . I did not make any examination of the stick, but the doctor and jury did. The wounds looked like they were made with something smooth, the skull or skin was not broken, and they had to be made with something smooth. The bruises about which I testified could have been made with any smooth stick, instrument, or weapon. I think that it would have to be

with some kind of a smooth weapon. It might have been done with a smooth piece of iron, wood, or steel, or any sort of a smooth bludgeon. It could have been caused by falling against a hard substance. It could have been done by falling against a stove. It might have been done by falling down the steps, or anything that way."

Dr. W. H. Henderson testified: "I am a practicing physician. I was at the home of the defendant, James B. Roberts, in this county, about the fourteenth of January last, and examined the body of Mrs. Roberts. When I saw her she was lying on a bed in the middle room; she was dead. There were two wounds on the head, one just across the left part of the frontal bone, about three and a half to four inches long, and the skull was crushed in, something like half of an inch; and near the middle and top of the head, running to the right, there was another wound about the same length. She had one wound on her hand and several what I took to be bruises over her body in different places. The skin was not broken in those wounds on the head. There was blood on her left hand and some blood on her face, and her nose had been bleeding. Her face looked as though it had been washed off. She was dressed in her ordinary clothing, lying on her back, straightened out. Her left hand was by her side and her right hand across her. I examined the bedclothing; they were considerably tousled, and there was some blood on the sheet and bedclothing, and over on another bed,—no there wasn't another bed there, but a cot, and over behind that I found several quilts and bedclothes that had blood on them. It looked as though they were thrown there. I saw a towel that was brought into the room; it had a little blood on it, not a great deal; and looked as though some one had just taken it in their hands and wiped their fingers on it. I saw this instrument (pole handed witness); I would take it to be a curtain pole. It is my judgment that she died from a lick from some blunt instrument, because the skull was crushed in two places. The wounds on her head were sufficient to cause her death. This pole was broken when I saw it, just like it is now. I found it myself in an adjoining room, behind a trunk. The break appeared to be fresh. I just placed this stick down in the wounds; they compared very well. From the wounds that I saw and the examination that I made, it is my

opinion that such wounds, to be made, would have had to have been made with a round stick or iron. I think this stick could have caused the injuries. From the condition and appearance of the wound the blow which was necessarily inflicted would have been sufficient to have broken this stick as it appears now. It would take two blows to make the wounds I found on her head. . . I guess it must have been between ten and eleven o'clock in the forenoon of Saturday, January 14, that I got to Mr. Roberts's house. . . I went there at the instance of the coroner. I have examined the pole I have in my hand, and think the breaks I see in it appear to be fresh. A piece of poplar like this is will stay fresh quite a little while. . . It looks as fresh now as when I first saw it. The wound or bruise that I saw on the head could have been done with any kind of smooth instrument. It might have been done with a piece of iron piping, an axe-handle, or anything that was round and smooth. Any of the wounds that I saw on the head could have been made with a smaller weapon than this. The skull is to the brain about what an egg-shell is to the meat of the egg. If the skull was broken we could tell to some extent whether it was done by a large or small weapon; we couldn't say as to the exact size, because the wound might possibly rise up a little. It would be something like breaking an egg. I might use a small instrument on an egg and break a small piece out of it, and then again a large piece out of it with the same instrument. I think the instrument in this case must have been not less than one inch in diameter. But, as a matter of fact, I can't tell that, either from a scientific or practical standpoint."

We have set forth this evidence for the purpose of showing that the circumstances, as developed by the evidence, were, as we have said, sufficient to authorize the jury to find that the allegation in the indictment, that the deceased was killed by striking and beating her on the head with a curtain pole, was sustained by the evidence. We think the circumstances clearly indicated that the crime was committed in the room where the body of the deceased lay. There was nothing in the evidence tending to show that anything which, if used as a weapon, could have produced the fatal wounds on the head of the deceased, except the freshly fractured curtain pole, was found in the house or about the premises. From the description of

these wounds by the witnesses who examined them, the character and condition of the pole, its proximity to the dead body, its comparison by one of these witnesses with the wounds, and the result thereof, the fact that bloody bedclothes were found behind a cot in the same room where the body was, and this fractured pole behind a trunk in an adjoining room, the jury were warranted in finding that this was the weapon used by the murderer. The curtain pole, when identified by the witnesses who were present when it was found after the commission of the crime, was admissible in evidence. In *Betts v. State*, 66 Ga. 508, it was held: "The deceased having been found dead, apparently killed by blows from a blunt instrument, a maul found near him, which did not usually remain in that place, his hat found a short distance from him, and his shirt with blood upon it were admissible in evidence." In *Thomas v. State*, 67 Ga. 460, a murder case, in which the evidence showed that the deceased was found dead, with her throat cut and a contusion on the side of her head as though she had been struck, it was held that "A stick used by a defendant charged with murder, and left by him shortly after the crime was committed," at a house where he had spent the night, "bearing upon it stains apparently of blood, was admissible in evidence." And in *Franklin v. State*, 69 Ga. 687, a knife shown to have been in the possession of the accused a day or two after the throat of the deceased was cut, and then showing traces of blood, was held to be admissible in evidence. The mere fact that the accused had closed his evidence when the State offered to introduce the curtain pole did not render it inadmissible, and the solicitor-general had the right to argue to the jury that this pole was the weapon used by the murderer. Of course the jury understood that the statement of the solicitor-general, objected to, was merely his contention from the circumstances disclosed by the evidence; and this contention he had the right to make.

5. The testimony of Wilson, of Mrs. DeWitte, and Miss Roberts, respectively set forth in the motion for a new trial as having been admitted over the objection of the accused, was not inadmissible. In each instance the testimony was objected to upon the ground that specific acts of violence on the part of the

accused toward his wife, prior to the time of the homicide, were not admissible against him, and because the facts testified to were not part of the *res gestæ* of the transaction for which the accused was on trial. The circumstance disclosed by the testimony of Wilson, to which objection was made, standing alone, seems very slight and trivial, and, unconnected with other testimony in reference to the relations existing between the accused and his wife, was irrelevant and immaterial, but could hardly have been, by itself, prejudicial to the accused. It is, however, unnecessary to inquire whether this particular testimony, or that of Mrs. DeWitte, set out in the motion for a new trial, was admissible at the time when it was offered. If there was any error in admitting the testimony of Wilson when it was admitted, it was cured when the State subsequently introduced the testimony of Mrs. DeWitte and that of Miss Roberts; and if there was error in admitting the testimony of Mrs. DeWitte when it was offered, such error was cured when the testimony of Miss Roberts was introduced. For the testimony of these three witnesses, considered together, tended to show a long course of ill treatment and cruelty on the part of the accused toward his wife, extending down to a period of time shortly before the homicide, thus illustrating the state of his feelings toward her when the alleged crime was committed. This testimony bears upon the question of motive, and tends to show the alienation of the husband's affection for his wife, and also, in the language of Mr. Justice Brewer, in *Thiede v. Utah*, 159 U. S. 510, "tends to rebut the presumed improbability of a husband murdering his wife." "In cases of uxoricide the previous relations of the husband and wife and a course of treatment by one towards the other may be shown." 1 McLain's *Crim. L.* § 417; *Hughes' Crim. L. and Proc.* § 139; *Underhill's Crim. Ev.* § 333; 2 *Bish. New Crim. Proc.* § 630; *Painter v. People*, 147 Ill. 444; *State v. Cole*, 63 Iowa, 695; *Boyle v. State*, 61 Wis. 440; *State v. Rash*, 12 Ired. 382; *State v. Bradley*, 67 Vt. 465; *Malce v. State*, 33 Tex. App. 14; *Thiede v. Utah*, 159 U. S. 510; *State v. Seymour*, 94 Iowa, 699; *Phillips v. State*, 62 Ark. 119; *People v. Colvin*, 118 Cal. 349; *People v. Buchanan*, 145 N. Y. 1; *People v. Decker*, 157 N. Y. 156; *Com. v. Holmes*, 157 Mass. 233.

The evidence of Miss Roberts and that of Mrs. DeWitte and

Mr. Wilson tended to show a substantially continuous course of conduct by the accused toward his wife, the deceased. As was said by Morton, J., in the case last above cited, in reference to evidence similar to that now under consideration, "It tended to show a settled ill will and malice on the part of the defendant towards his wife, and therefore bore directly on the question whether there was any motive for him to commit the crime. It was not [admissible] for the purpose of showing separate and independent acts and threats, but for the purpose of showing a course of conduct. It was unavoidable that, in showing the course of the defendant's conduct, evidence of his acts and threats should be introduced. His course of conduct could not be shown so satisfactorily in any other way." On the same line, it is held, that, upon the trial of a husband for the murder of his wife, it is competent to show that he had become infatuated with another woman, in order to rebut the presumption of a husband committing such a crime, by showing the alienation of his affections and suggesting a possible reason for his desiring the death of his wife. *Gillett, Ind. and Circum. Ev.* § 59; *People v. Harris*, 136 N. Y. 423; and see *Shaw v. State*, 102 Ga. 660, where the accused was charged with wrecking a passenger-train, and where such evidence was held admissible, as his wife was shown to have been a passenger upon the train. There is nothing in the cases of *Pound v. State*, 43 Ga. 88, *Daniel v. State*, 103 Ga. 202, and *Horton v. State*, 110 Ga. 739, which are cited by counsel for the plaintiff in error, in conflict with our ruling in the present case. In *Pound's* case the homicide occurred in February, 1867, and the fact proved which this court held to have been inadmissible was, "that in October or November, 1866, the deceased spoke to the prisoner at the Sunday-school, and he did not answer him." This was a separate, distinct, and isolated occurrence; and the rule was laid down in the headnote, that evidence of this character must not relate to "a separate, distinct, and independent act, but there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motives of the parties, to render such particular act or acts admissible."

In *Daniel's* case the error assigned was that the court refused "to permit the accused to prove that, several months before the homicide, he had procured a pistol to be used by a person in quelling a disturbance in which the deceased participated, and that ever since that time the deceased had borne him ill will and had repeatedly threatened his life. The court had previously allowed proof of threats communicated to the accused, and the sole question raised by this assignment [was] as to whether it was competent to prove this act of the accused occurring several months prior to the time of the homicide." It was held that it was not. The headnote dealing with this ruling of the court was, that, "It was not . . . competent for the accused to prove that on a former occasion, remote in time from the day of the homicide, he had done an act which incensed the deceased; it not appearing that what occurred on that occasion was followed up by any subsequent quarrels or difficulties between the accused and the deceased, or that the act of the accused on the previous occasion tended to throw any light whatever upon his motive in taking the life of the deceased." In *Horton's* case it was held: "It is not, in a trial for murder, competent to prove that, years before the homicide, there had been a difficulty or quarrel between the accused and the deceased, without showing that in consequence thereof the former had continuously entertained hostile feelings toward the latter, or that the old grudge had something to do with the homicide." To the same effect, the plaintiff in error might have cited *Monroe v. State*, 5 Ga. 85, and *Hatcher v. State*, 18 Ga. 460. The distinction between each of these cases and the present one is obvious. These cases are authority for holding that an isolated act or incident, remote in time from the homicide, which tends to show that at the time of its occurrence there was ill will on the part of the accused toward the person he is charged to have murdered, or of such person toward him, is not admissible in evidence. But they are not authority for holding that a series of acts tending to show a course of conduct on the part of one party toward the other, affirmatively shown to have continued until shortly before the homicide, and tending to illustrate the state of feeling existing between them at the time of the homicide, is not admissible. This distinction was recognized in *Monroe's* case, when it was

said: "Repeated quarrels may be shown between the parties, to establish the *malo animo*; but you can not go back to a remote period, and prove a particular quarrel or cause of grudge, unless it be followed up with proof of a continued difference flowing from that source." In *Hatcher's* case, which was a case of assault with intent to murder, the trial court had ruled out testimony offered to show a fight between the prosecutor and the defendant, about two years prior to the alleged crime for which the accused was being tried; and this court held it was not error to require him, in introducing testimony of this character, to begin at the offense charged in the indictment and trace the relations or state of feeling between the parties back to the first difficulty between them. In the case with which we are dealing, this course, whether intentionally or otherwise, was the one pursued, the course of conduct of the accused toward his wife being traced backward from the homicide through a series of years.

The statement of the witness, Mrs. DeWitte, "I reckon he was angry or he wouldn't have hit her," was objected to as a conclusion of the witness; but even if the opinion of the witness, when accompanied by the facts upon which it was based, was not admissible, the accused could not have been hurt by its admission, as the conclusion from the facts stated by the witness was self-evident and irresistible. The testimony of Miss Roberts, which was introduced after the accused had closed his evidence and made his statement, was objected to upon the ground that it was not in rebuttal. There would be no merit in this objection even if the testimony of this witness was not in rebuttal of anything presented by the defendant. It is within the discretion of the court to reopen a case, for the admission of further evidence, even after both sides have announced closed and the argument has begun. *Hoxie v. State*, 114 Ga. 20; *Strickland v. State*, 115 Ga. 222; *Duggan v. State*, 116 Ga. 846. As a matter of fact, however, the testimony of this witness was in rebuttal of evidence introduced by the accused and of portions of his statement.

6. The testimony of Wilson, that the accused did not appear to be excited when he came to the witness in the woods, but did seem to be excited when the witness got back from Chattanooga, was objected to, "because how the defendant appeared

at the times witness testified about were mere matters of opinion and a conclusion of the witness, and not questions of fact that should go to the jury." This was not a good objection. In *Choice v. State*, 31 Ga. 424, it was held competent for witnesses to state that the accused "appeared to be drinking." In *Pierce v. State*, 53 Ga. 365, it was held that where it was competent to prove drunkenness, a witness might give his opinion thereon, after stating the facts on which he based it. In *Travelers Insurance Company v. Sheppard*, 85 Ga. 752 (8), it was held: "The manner and appearance of a speaker, whose acts and utterances belong to the *res gestæ*, are relevant evidence; and that he looked wild and seemed excited is matter of fact, not of opinion for which reasons ought to be specified. The signs of emotion may be described by the use of general terms, without any enumeration of particulars." In the opinion Chief Justice Bleckley said: "An observer may testify to the exhibition by another of excitement or any emotion such as alarm, without specifying the various minute facts which indicated the same to the mind of the witness. The emotions register themselves in the appearance and manner; and when a witness testifies to the existence of the emotion, his plain meaning is that he observed the numerous and often nameless indications by which that species of emotion is commonly manifested." To the same effect, see *Leary v. Leary*, 18 Ga. 696. It is very clear that there was no merit in the objection to this testimony, which took the broad ground that how the defendant appeared on the occasions referred to by the witness was mere matter of opinion which could not go to the jury. This ruling also disposes of the ground of the motion complaining of the admission of the testimony of Tucker, of a similar nature, over the same objection by the accused. But even if it did not, it is hardly conceivable that the testimony of Tucker, objected to as being the expression of an opinion, could have been at all prejudicial to the accused. The witness did not know whether the accused seemed to be excited or not when he saw him at the house, and so did not express any opinion upon that point. We do not see how his statement, that the defendant "seemed to be in trouble or something, he was taking on a great deal about it," could have been harmful to the accused. The fact that a husband, within a few

hours after his wife had been murdered and while her dead body was almost in his very presence, should seem to be in trouble and should be taking on a great deal, would certainly not, to a rational mind, be even a slight indication of his guilt. The most innocent and loving of husbands, under such circumstances, would doubtless seem to be in trouble and might take on a great deal about the awful calamity which had suddenly befallen him.

7. The assignment of error upon the charge complained of in the 13th ground of the motion for a new trial is, that its effect was to "withdraw from the consideration of the jury the statement of the defendant, and cause them not to give it that consideration contemplated by law." The error assigned upon the charge complained of in the 14th ground is the same. There is no complaint that the judge did not properly instruct the jury with respect to the prisoner's statement; and the entire charge, sent up with the record, shows that he did. It has been repeatedly held that it is not, upon the trial of a criminal case, error for the judge to shape his general charge to the jury upon the evidence alone and the law applicable thereto; but he should, at some stage of the charge, appropriately instruct the jury with respect to the prisoner's statement. If, however, a proper written request is submitted to the court to charge on any matter of defense set up in the statement, such request should be granted when the instruction requested is applicable to the matter of the statement and expressed in appropriate terms. *Vaughn v. State*, 88 Ga. 731; *Muller v. State*, 94 Ga. 1; *Lacewell v. State*, 95 Ga. 346; *Sledge v. State*, 99 Ga. 684; *Hoxie v. State*, 114 Ga. 19; *Hays v. State*, Ib. 25; *Tucker v. State*, Ib. 61.

8. There is no merit whatever in the 15th ground of the motion. The error assigned upon the instruction here excepted to is, not stating in this connection "the degree of evidence required to prove the mental unsoundness of the accused." The judge fully charged the jury with reference to the amount of mental capacity necessary to the commission of a crime; and further, that even although the accused was able to distinguish between right and wrong in relation to the homicide, at the time it was committed, yet if, in consequence of some delusion, his will was overmastered and he had no criminal intent, and the homicide was connected with the peculiar delusion under which

he was laboring, he would not be criminally responsible for his act. So, irrespective of the rule that a charge in itself proper is not rendered erroneous by a failure to give another appropriate instruction in the same connection, it is evident that the assignment of error is entirely without merit.

9. While the request to charge set forth in the 16th ground of the motion contained a proper statement of the law in reference to the degree of evidence necessary to sustain the defense of insanity, the request, as a whole, was not free from objection. It assumed that the defendant had introduced evidence of his insanity at the time the alleged offense was committed. He had introduced testimony the object of which was to show his insanity at such time, but whether this testimony was evidence of his insanity when the homicide was committed was a question for the jury alone. Suppose the court had instructed the jury that the State had introduced evidence of murder, would not such instruction have been erroneous? We think clearly so. Evidence upon the question of insanity and evidence of insanity are different things. Besides, the request treated any degree or form of insanity as being sufficient to render the accused irresponsible for the homicide, and so was too broad. The insanity which renders the perpetrator of a particular act, which would ordinarily be criminal, incapable of committing a crime by its perpetration is such as to deprive him of the capacity to distinguish between right and wrong relatively to such act. The perpetrator may be insane in a loose and general sense, and yet be, in the eye of the law, sane and responsible so far as the act in question is concerned. The refusal of the court to charge as requested was, therefore, not erroneous.

10. While the conduct of the solicitor-general, complained of in the 18th ground, in disputing the answer of a witness for the defendant, on cross-examination, in reference to what he had previously testified as to the time that he got out to Robert's house, was improper, and, upon objection thereto, was not rebuked by the court, yet it was not such as to require the grant of a new trial. The prosecuting officer should not have disputed the answer of the witness; but as the jurors had heard and doubtless remembered the previous testimony of the witness on the point in question, they were not all likely to be influenced

or misled by this remark of the State's counsel. Besides, the question about which the dispute occurred was not at all material. The last ground of the motion seems too trivial for discussion. As the evidence fully warranted the verdict, and there was no error in overruling the motion for a new trial, the judgment of the court below is

Affirmed. All the Justices concur, except Simmons, C. J., absent.

PARK v. THE STATE.

COBB, J. The evidence was altogether circumstantial, and, not being of such a character as to show the guilt of the accused beyond all reasonable doubt, a new trial should have been granted.

Judgment reversed. All the Justices concur, except Simmons, C. J., and Candler, J., absent.

Argued May 16, — Decided June 13, 1905.

Indictment for murder. Before Judge Lewis. Greene superior court. April 8, 1905.

The plaintiff in error was convicted under an indictment charging him with the murder of his wife. The evidence tended to show that she was killed by shots fired from a gun, or gun and pistol, while she was standing at a well near the house in which she and the accused lived. She was killed in the afternoon of Friday, and the last time they were seen before the killing was about noon on that day, at Webb's house, about a mile or three quarters of a mile from the scene of the homicide. Webb's house was on H. G. Moore's place, where the accused was employed as a laborer, and the deceased brought his dinner there that day, as she had been in the habit of doing, and left, saying that she was going back home to do some washing. The accused ate his dinner and left, going towards Moore's house, which was in a different direction from that in which his wife had gone. Webb testified that while the accused and the deceased were there on that occasion, the accused asked him if he had "known people to kill people and get off." Nothing had been said before, as to killing anybody. The accused told Webb that he and his wife were "mad," and had not spoken since Thursday morning. Webb's wife testified that later they met the accused coming towards

them, and that he fell down and said that somebody had killed his wife, and grunted. They went to where she was killed, and found her lying there. There was testimony by two witnesses as to tracks at the place of the homicide, which were found the next morning, and which corresponded with the shoes then worn by the accused. One of these witnesses (H. G. Moore) testified: "I made investigation, next morning, as to signs indicating the place where the person was who did the shooting. . . I saw where he was lying or kneeling down when the shot was fired. It was seven steps from where the woman fell, behind a garden fence and a fig tree. I could see where the grass had been bent down, and it looked like he had been kneeling. I went to where he got over the fence and went on down, and as soon as I got to where I could see his track plain I noticed it. He was sort of pigeon-toed, and as soon as I saw the track I told some one to bring him there, and I put his foot in the track. Mr. Ingram had his left foot and I had his right foot. His right shoe was bursted, and when he bore down on it that bore the counter down on the ground, and it made a print; the counter of his shoe went down into the ground. I did not notice the other foot, but I know he walks pigeon-toed. The track and his shoe fitted exactly. . . I saw 15 or 20 tracks; we took the measure of 5 or 6. The tracks were of a pigeon-toed character. . . There was only evidence of one track from what I saw. . . The ground was dry. . . I did not see any tracks in the garden. The garden was grown up in grass. . . The tracks were leading towards my house. . . Going through the place where the killing was is the nearest way to the ferry, nearer than round by the public road, and there are a good many negroes on this place. . . There were probably 50 or 75 darkies over there during that day." Ingram testified: "I was on the coroner's jury; it was held about 10 o'clock in the morning, the next day after the killing. . . I saw where there were tracks in the garden, the way he came and the way he ran back, and the way the woman at the well stood, and the way the party that did the shooting ran. He came up back of the garden and of some figs. . . You could see that the party was standing that did the shooting, and he jumped over the fence. . . There was but one track, and it went in different directions. There was a lot of woods there. He came up from the lower edge of it, and turned and

went to the right, and got to the lower edge of the garden. He came one way and went another. . . I went and got the defendant and carried him down where the tracks were. . . He had a shoe that was peculiar, that had a sort of plug out of it, about the size of a silver half-dollar. It was the plug that looked like it had been cut out. He had on that shoe when I found him. I measured five or six tracks, and the shoes he had on corresponded with these tracks exactly; the little piece in the shoe fitted in the tracks. The little plug being cut out was a very unusual condition for the shoe to be in. I don't reckon there is another shoe like it in a thousand. . . . I think the patch was on the left shoe. . . I looked for the tracks after I was sworn on the coroner's jury. I did not pay much attention to them in the garden. I reckon we tracked them 200 yards toward the river. . . You could not see the tracks plain in the garden. . . There were a good many negroes out there that day. I only noticed that one track. . . I could not tell whether the tracks in the garden were the same as went down that pasture. We fitted the shoe to the tracks on a galled place about one hundred yards from the garden; you could see a plain track there. I did not examine to see if there were any tracks any nearer the well than the garden. . . I think these tracks were leading in the direction of Holcomb Moore's house. . . We followed the tracks until we could not find them any more. We measured four or five, and they fit exactly." Moore testified, that some weeks after the homicide he found a gun and pistol about a hundred yards from where the accused had been at work on the day of the killing; the gun was hid in a gully, in broom-sedge, and the pistol was near it. The gun had an empty shell in it. Ingram testified, that when the gun was afterwards shown to the accused, he said it belonged to his brother, and that the pistol belonged to Henry Lee; "he said he had owned the gun or pistol, one." Henry Lee testified, that the pistol belonged to him and the gun to a brother of the accused; that they were kept in the house of the mother of the accused, near where the accused lived; that the pistol was kept in a trunk, which was unlocked; that he missed it on Friday night, and that the last time he had seen it before that night was on Wednesday night, when he greased it and put on the trunk, with a rag over it. There was testimony as to a razor

cut on the leg of the deceased, made by the accused a short time before the homicide, and that he said it was made accidentally. There was further testimony as to bad feeling between them. A witness testified that on the day preceding the day of the homicide the deceased said she was afraid that John Henry Jackson was going to kill her; that she was afraid of him because he and her husband "had been in some words." The accused made a statement to the jury, in which he said that at the time of the killing he was at work in a field near Mr. Moore's house, about a mile from the place of homicide; and that there had been bad feeling toward him on the part of John Henry Jackson; that his wife had told John Henry to quit coming to the house to see her sister; and that about two weeks before the killing he was told that John Henry had threatened to kill him.

James B. & Noel P. Park, for plaintiff in error, cited *Ga. R.* 110/293; 97/212 (3); 50/513; 53/252; 57/482; 110/310; 113/721; 114/10; 121/334.

John C. Hart, attorney-general, and *Joseph E. Pottle*, solicitor-general, cited *Ga. R.* 59/738; 63/90; 92/14.

FOLDS v. THE STATE.

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1. No abuse of discretion is shown in the refusal by the court to postpone the hearing of a certiorari case because of lack of opportunity to file a traverse to the answer of the county judge, when it does not appear from the record that the plaintiff in error did not have such opportunity.
2. Previous residence in the county for six months before serving is a necessary qualification of a grand juror. Disqualification on this ground is proper defectum, and when urged by plea in abatement, before the indictment should be quashed it must affirmatively appear that the accused did not have notice and opportunity to make the question by challenge before the finding of the indictment.
3. The evidence admitted was not objectionable for the reason assigned.
4. "Indecently acting," as used in the Penal Code, § 418, must be taken in its comprehensive sense, and embraces all improper conduct which interrupts and disturbs a congregation of persons lawfully assembled for divine worship.
5. Where a congregation assembled for divine worship, after the morning service, had adjourned for dinner to be served on the church grounds, with the intention of returning after the meal to the church house for an afternoon service, in contemplation of the statute the congregation had not dispersed while partaking of their dinner, but were still assembled for the purpose of divine worship.

Certiorari. Before Judge Lewis. Putnam superior court. March 22, 1905.

The defendant was convicted, in the county court of Putnam county, of the offense of interrupting and disturbing a congregation of persons lawfully assembled for divine service, and he sued out a writ of certiorari. The bill of exceptions is to the refusal of the court to sustain the certiorari and order a new trial.

W. T. Davidson, for plaintiff in error.

J. E. Pottle, solicitor-general, and *S. T. Wingfield*, contra.

EVANS, J. (After stating the facts.) 1. It appears from the petition for certiorari and the answer of the judge that upon the call of the case in the county court the defendant, through his counsel, asked a postponement of the hearing until he had an opportunity to prepare and file a traverse to the answer of the judge. It does not appear other than that all the proceedings were had at the return term of the writ when the answer of the judge was filed. The defendant in certiorari may at the first term, and before the hearing, traverse the truth of the answer or return, which traverse shall be in writing. Penal Code, § 767; Civil Code, § 4651. Should it appear that the answer was filed at such a time as not to give the plaintiff in certiorari an opportunity to prepare and file a traverse; the court should allow time sufficient to prepare the traverse, but as the record does not disclose that the plaintiff in certiorari did not have ample time to prepare and file his traverse to the answer of the county judge, it can not be said that the court abused its discretion in refusing to allow additional time within which to prepare and file the traverse.

2. One of the errors alleged in the petition for certiorari was the overruling of the plea in abatement filed by the defendant. It was alleged in the plea that one of the grand jurors who served upon the jury that returned the bill had not resided within the county for a period of six months. The evidence submitted established the truth of this allegation, but there was no evidence submitted to the court to show that the accused did not have full notice of the fact and an opportunity to make the question by challenge before the finding of the indictment. A necessary qualification of a grand juror is residence in the

county for six months preceding the time of serving. Penal Code, § 811. The disqualification of a grand juror who has not resided in the county the requisite time before service is *propter defectum*; and must be made by the accused before the finding of the indictment, unless it appears that he did not have full notice and opportunity to make the challenge. *Edwards v. State*, 121 Ga. 590. The evidence offered by the accused failed to show that he did not have notice that it was probable that an indictment would be preferred against him, so as to give him an opportunity to challenge the competency of the juror. There was, therefore, no error in overruling the plea in abatement, upon the evidence submitted.

3. The plaintiff in error complains that the court erred in allowing a witness to testify that while the defendant was in his custody under arrest, he stated that the pistol dropped out of his pocket and was accidentally discharged, with no intent on the part of the defendant to shoot it. The objection was that this statement amounted to a confession, and was obtained under such circumstances as to show that it was not voluntarily made. In the first place the evidence was not a confession of guilt; the defendant distinctly disclaimed any intention to discharge the pistol, and asserted that its firing was the result of accident. Even if the statement amounted to a confession, it was not inadmissible because made while he was under arrest, when it appeared that it was voluntary and not induced by the slightest hope of benefit or the remotest fear of injury. *Hilburn v. State*, 121 Ga. 344 (3.)

4. After defining the offense of disturbing divine service, in the language of the statute (Penal Code, § 418), the court charged as follows: "I charge you that to shoot a pistol on a church ground or near thereto while a congregation of persons were lawfully assembled there for divine service would be a violation of this section; whether the persons were assembled in the church or were out on the church ground for dinner would make no difference. I charge you that if you believe from the evidence that the defendant shot the pistol and that the shooting was not accidental, then it would be your duty to convict him." Error is assigned upon this charge, first, because the disturbance of a congregation assembled for divine worship, by the discharge of a

pistol on a church ground or near thereto, is not comprehended in the Penal Code, § 418; and secondly, that the charge instructed the jury that they might convict if they found that the pistol had been discharged (not accidentally) by the defendant after the persons assembled at the church had left the building and were upon the ground for the purpose of serving dinner. The section of the Penal Code last cited was designed primarily for the protection of congregations of persons lawfully assembled for divine service. Any interruption caused by cursing or using profane or obscene language, or by being intoxicated, or otherwise indecently acting, would be a violation of the statute. The words "indecently acting," used in the statute, must be given a comprehensive meaning. Indecent conduct, in its general sense, means improper conduct, and in determining what conduct would be indecent the proprieties of the occasion must always be considered. A congregation may be disturbed by the discharge of firearms in the church building, and the persons assembled more greatly frightened than by the mere presence of an intoxicated man. If a person were to use an oath in church during the progress of the service, so as to distract the attention of any member of the congregation, his conduct would be within the exact letter of the statute. The commotion caused by the discharge of firearms very probably would be greater than the disturbance occasioned by the utterance of a single oath; and it would be giving the statute entirely too narrow and restricted a meaning to hold that unless the conduct amounted to profanity or obscenity it would not be indecent. Thus, in *Hicks v. State*, 60 Ga. 464, the second count in the indictment was as follows: The defendants "did then and there indecently act and attempt to prevent the administration of the holy sacrament of the Lord's supper at the First African Baptist Church in Savannah;" and it was held that this count sufficiently charged indecent behavior in attempting to interrupt the communion of the Lord's supper. "Any attempt to do so is indecent." If an interruption of one of the church ceremonies would amount to indecent conduct, the disturbance of the congregation while assembled for divine service, by boisterous, tumultuous, or unseemly behavior would be indecently acting, in the terms of that phrase as used in the statute.

5. The second criticism made upon the charge is without merit. It was ruled in *Minter v. State*, 104 Ga. 752, that a congregation of persons which had been lawfully assembled under a bush arbor for divine service could be disturbed by such acts as are specified by section 418 of the Penal Code, although the persons composing the congregation may have been dismissed from the arbor but remained assembled around it for the purpose of administering to the wants of their domestic animals and preparing and eating their own dinners. The evidence submitted on the trial of the present case authorized the conclusion that the defendant, within a hundred yards of the church, and immediately after the congregation had left the church building for the purpose of preparing dinner, did intentionally discharge his pistol, to the disturbance of the congregation. On this particular day two services were held, one in the forenoon and the other in the afternoon, and dinner was served upon the church grounds between the time of holding these two services. In the contemplation of the statute the congregation had not dispersed, but was still lawfully assembled for the purpose of divine worship; and proof of an intentional discharge of a pistol by the defendant in the near vicinity, to the disturbance of the congregation, was sufficient to authorize his conviction of the offense with which he was charged. Accordingly there was no error in overruling the petition for certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SKRINE v. THE STATE.

The evidence warranted the verdict, there was no error in the charges excepted to requiring the grant of a new trial, and the certiorari was properly overruled.

Argued May 16, — Decided June 13, 1905.

Certiorari. Before Judge Holden. Hancock superior court.
March 31, 1905.

W. H. Burwell, for plaintiff in error.

D. W. Meadow, solicitor-general, contra.

FISH, P. J. Pellam Skrine was convicted, in a county court, of the offense of intentionally pointing or aiming a gun at an

other, not in a sham battle by the military and not in self-defense, etc., as defined in the Penal Code, § 343. He carried the case, by certiorari, to the superior court. The petition for certiorari alleged: That the verdict was contrary to law and the evidence and without evidence to support it. (3) That the county judge erred in charging the jury: "The law makes you the exclusive judges of the evidence, and the court has nothing to do with intimating to you, or in your presence, what is or what is not sworn to in this trial." (4) That he erred in charging: "But you are required to take the law expounded to you by this court." (5) That he erred in charging: "It is your duty further to reconcile the testimony which may seem conflicting, without imputing perjury to any witness, but in any event to reach a conclusion that leaves no reasonable doubt of guilt." (6) That he erred in charging: "Witnesses are entitled to be believed unless contradicted, discredited, or impeached in some of the ways known to and prescribed by the law." The certiorari was overruled, and the accused excepted and brought the case here for review.

The judgment of the superior court should be affirmed. The evidence for the State fully authorized the verdict. The instructions given by the county judge to the jury, of which complaint is made, are substantially correct, with the exception of the charge complained of in the fifth ground of the petition for certiorari. While it was evidently the purpose of the trial judge to charge the jury that they should not reach a conclusion that the accused was guilty unless such conclusion was authorized by the evidence beyond a reasonable doubt, the charge as given was somewhat involved, and, standing alone, might have been misunderstood by the jury; but in view of the entire charge of the county judge, as shown by his answer to the writ of certiorari, we do not see how the jury could have been misled by the language excepted to. Before giving the instruction complained of, he charged, "but before you can convict, the evidence must show you beyond a reasonable doubt that he is guilty;" and after the charge excepted to, he instructed the jury, "but if the evidence is insufficient, or you have a reasonable doubt of his guilt, you should acquit." We can not see, therefore, how the jury could have understood, from the charge in question, that

the judge intended to instruct them that they should, in any event, reach a conclusion that the accused was guilty.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

BROWN v. THE STATE.

COBB, J. The evidence authorized the verdict, and there was no error in denying a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 16, — Decided June 13, 1905.

Indictment for murder. Before Judge Freeman. Coweta superior court. April 27, 1905.

J. W. Shell, W. L. Stallings, and A. H. Freeman, for plaintiff in error.

John C. Hart, attorney-general, and J. R. Terrell, solicitor-general, contra.

HALL COUNTY v. GILMER.

1. Where exceptions pendente lite are filed to the overruling of a demurrer, and are duly certified by the judge whose ruling is complained of, and are entered of record, no further certificate by the judge as to that ruling is required. If the exceptions pendente lite are properly brought to this court in the transcript of the record, error may be assigned thereon in this court, though no complaint be made in the main bill of exceptions of the ruling complained of in the exceptions pendente lite.
2. Therefore, where a defendant demurred to a petition, and the demurrer was heard and overruled by one judge, and exceptions pendente lite to his ruling were duly presented, certified, filed, and entered of record, and the case referred to an auditor, who found adversely to the defendant; and where, at a subsequent term of court, exceptions to the auditor's report were heard by another judge and overruled, a writ of error to this court, complaining both of the overruling of the demurrer and the overruling of the exceptions to the auditor's report, duly certified by the judge who heard the latter, will not be dismissed on the ground that it should have been certified by the judge who heard and overruled the demurrer.
3. While a judge can not properly certify to what did not take place before him, he may certify to matters of record in the case before him; and therefore a judge may certify that a bill of exceptions pendente lite was certified, filed, and appears of record in the case, though the ruling complained of by the exceptions pendente lite may have been made by another judge than himself.

4. A county is not liable to its sheriff for his costs, allowed by the Penal Code, § 1107, for conducting prisoners before a judge or court to and from jail ; but these costs must be collected by the sheriff from the prisoners after conviction.

Submitted April 14. — Decided June 13, 1905.

Exceptions to auditor's report. Before Judge Kimsey. Hall superior court. January 21, 1905.

Fletcher M. Johnson, for plaintiff in error.

Dean & Hobbs, contra.

CANDLER, J. 1-3. This case comes from the superior court of Hall county. It was an action of complaint brought against the county by Gilmer, for certain sums alleged to have been due him for services as sheriff of the county. A demurrer to the petition was filed by the county, and this demurrer was heard and overruled by Judge Russell, of the Western circuit, presiding in place of Judge Kimsey. Exceptions pendente lite to the overruling of the demurrer were duly presented, certified by Judge Russell, and filed as part of the record in the case. This was at the January term, 1903, of Hall superior court. At the July term, 1904, of that court, Judge Russell referred the case to an auditor, who, at the January term, 1905, filed his report, which in every important particular was favorable to the plaintiff. The defendant filed exceptions of law to the auditor's report, which were heard and overruled by Judge Kimsey, of the Northeastern circuit. Within the time prescribed by law the defendant presented its bill of exceptions to Judge Kimsey, complaining of the overruling of its demurrer by Judge Russell, and of the overruling of its exceptions to the auditor's report by Judge Kimsey. The bill of exceptions was certified as true by Judge Kimsey, and the portions of the record specified as material to a clear understanding of the alleged errors, including the exceptions pendente lite, were transmitted to this court. Upon the call of the case here, the defendant in error moved to dismiss the writ of error, because the bill of exceptions excepts to acts of Judge Russell more than thirty days before the bill of exceptions was sued out; because the bill of exceptions should have been presented to Judge Russell, and not to Judge Kimsey; because no litigant should be allowed to join in one bill of exceptions complaints of the acts of two judges, one at one

term of court and another at a subsequent term; because the plaintiff in error does not except to the final judgment in favor of the plaintiff against the defendant; and because the bill of exceptions does not plainly specify the errors complained of.

The motion to dismiss is without merit. The only object of exceptions pendente lite is to preserve as part of the record, by means of the certificate of the trial judge, that which transpired on the trial of the case, and which would not otherwise appear of record. This is accomplished by the certificate of the trial judge to the bill of exceptions pendente lite; and so, in the present case, it was not necessary that the bill of exceptions on final writ of error be certified by Judge Russell, as he had already certified the bill of exceptions pendente lite. In *South Carolina R. Co. v. Nix*, 68 Ga. 572, it was held: "Where bills of exceptions pendente lite are certified, filed, and entered of record, when the case is brought up after final judgment, error may be assigned thereon upon motion in this court, though no mention be made of them in the main bill of exceptions. They are part of the record, and, having been certified once, need not be certified again." See also *Hardee v. Griner*, 80 Ga. 559. Nor do we know of any reason why a litigant may not join, in one bill of exceptions, complaints of the rulings of two different judges, so long as they pertain to the one case in hand and are in due and legal form presented to this court. It is true that Judge Kimsey could not properly certify to what took place on the hearing of the demurrer before Judge Russell. *Cutts v. Scandrett*, 108 Ga. 620. But it was entirely within his province to certify to what appeared of record in the case before him; and as the exceptions pendente lite were duly entered of record, there was nothing to prevent Judge Kimsey from certifying to that fact and ordering the clerk to send those exceptions to this court as part of the record material to a clear understanding of the alleged errors. It was not necessary for the plaintiff in error to except to the judgment entered on the report of the auditor; for had either of the rulings of which it complains been made as it contends they should have been made, the case against it would necessarily have been at an end. There is no merit in the contention that the bill of exceptions does not plainly specify the errors complained of.

4. The sole question presented by the bill of exceptions is whether a county is primarily liable to its sheriff for the amount of \$1.25, allowed that officer by the Penal Code, § 1107, for each prisoner conducted before a judge or court to and from jail, or whether this fee must be made by the sheriff out of the defendant after conviction. The code section referred to enumerates the fees allowed to sheriffs for various designated services; and at the conclusion of this enumeration provides that "Mileage fees, executing criminals, and for guards herein provided, shall be paid by the county, and no criminal cost herein provided for shall be collectible out of the defendant until after conviction, except costs accruing upon forfeited recognizances." Nowhere in the section is there any direct and explicit provision as to how the costs now under consideration shall be paid; but certainly there is a clear inference in the language quoted that they shall be made out of the defendant, and that the county shall not be primarily liable for them. For if it was intended that the county should pay them in the first place, what reason could there have been to provide that they should not be "collectible out of the defendant until after conviction"? In other words, if they were not to be made out of the defendant, why should it have been necessary to state when the liability of a defendant should arise? We can conceive of no answer to these questions, except that it was the intention of the General Assembly that the officer should look to the prisoners themselves for his cost for conducting them before a judge or court, to and from jail. The case of *Sapp v. Rozar*, 70 Ga. 722, is not in point. It was there decided that a sheriff is only entitled to be paid once for bringing a prisoner confined in jail into court for trial, and once for returning him, and that he can not claim a fee for each time he may conduct a prisoner to and from the jail pending trial. The question as to who was liable for the costs did not enter into the decision. It is true that the defendant in error in that case was the ordinary of the county, and presumably he considered the county liable for the costs which were really due; but as that question was not made or decided in the case, that decision is not authority either for or against what is now held. The court below should have sustained the demurrer to the petition.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

DAVIS, guardian, v. SANDERS *et al.*

1. A bequest to B and her children is a bequest to a class. The class consists of B and such of her children as survive the testator.
2. If B has no children at the death of the testator, she will take the whole estate.
3. If B had a child who died before the testator, leaving issue, such issue would not share with B in the legacy.

Argued May 18, —Decided June 13, 1906.

Petition for direction. Before Judge Lewis. Jasper superior court. December 7, 1904.

In 1895 W. C. Leverett executed his last will and testament, the fourth item of which is as follows: "Having heretofore disposed, by deed or otherwise, of all my real estate, I desire and direct that my personal property be divided equally between my wife Fannie J. Leverett, my daughter-in-law Ella Leverett, and her children, my daughter Sallie Pound, and her children, and Bettie Sanders, and her children now or hereafter born, my idea being to divide said personalty into four shares, my said wife to have one, my daughter-in-law and two daughters and their children to have the other three." Subsequently, in 1898, he executed a codicil, the second item of which is as follows: "It is my will that the division of my personal property, contemplated and provided for by the fourth item of my said will, shall be made only of my personal property left remaining after my said wife shall have received the personal property given to her by items one and two of said will; that is to say, she shall first receive the property given her in items one and two, and shall then receive one fourth of the remainder or balance of my personal property." The testator died in 1902, and Mrs. Fannie Leverett and W. A. Reid qualified as his executors. At the time of the execution of the will Mrs. Sanders had two children, Leola and Lyman. Between the time of the execution of the will and the death of the testator both of these children died, Leola leaving no issue and Lyman leaving a wife and child. The executors filed a petition for direction and construction of the items of the will and codicil above quoted, the precise question being whether Mrs. Sanders, under the facts, was entitled to all of the bequest to herself and her children, or whether the heirs of the

deceased child were entitled to participate with her as tenants in common. The case was submitted to the judge without the intervention of a jury, and he rendered the following decree: "After argument heard it is considered and adjudged, that Mrs. Elizabeth Sanders takes, under the will of W. C. Leverett, all of the one fourth of the residuum of said personal property devised by item four of said will and item two of the codicil thereto, and that neither the said B. H. Sanders, Annie May Sanders, nor Annie Lee Sanders, minor, take any share or interest or part of said residuum or of said estate of said W. C. Leverett. It is further ordered and adjudged that said executor and executrix do pay unto the said Mrs. Elizabeth Sanders all of said one fourth of said residuum, and pay nothing to the said B. H. Sanders, Mrs. Annie May Sanders, or Annie Lee Sanders, minor. It is further considered that the costs of this proceeding be borne and paid by the said executor and executrix as a part of the expenses of administration. This December 7th, 1904." The exception is to the construction of these two items, given by the judge in his decree.

Turner & Adams, for plaintiff in error.

F. Jordan & Son and *Greene F. Johnson*, contra.

EVANS, J. (After stating the facts.) A gift to a class does not lose its character as a class gift because some of the individuals of the class are named. If the devise or legacy is to named individuals of a definite moiety, the devisees or legatees do not take as a class, notwithstanding they may sustain to the testator the same relation, and all might have been included under a general description, such as children, nephews, or the like. But where one of the persons who is to take with the class is named, and the others are uncertain in number, to be ascertained in the future, the share of each dependent upon the actual number, the devise is to the class as a body of persons and not as individuals, unless the will or the attendant circumstances require a different construction. 30 Am. & Eng. Enc. L. (2d ed.) 718. Mr. Jarman in his treatise on wills (1 Jar. Wills, § 232) says, that the question does not depend upon the classification of the persons under a general name, "but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of per-

sons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." In the case of *Aspinwall v. Duckworth*, 35 Beav. 307, it was held, that a gift to A and the children of B was a gift to a class, and that if one of them happened to die in the testator's lifetime the survivors would take the whole, and if only one survived he would take the whole fund. As was said by the Master of Rolls in *re Stanhope's Trusts*, 27 Beav. 203, "a person may make a bequest to a class, as to the daughters of A and the daughters of B, and he may add any other person to them, making together one class, and that is what is done here, and only those daughters who survived the testator take vested interests. It is not a question of taking as tenants in common or joint tenants; but whether they take as tenants in common or joint tenants, they take nothing unless they survive the testator."

The learned counsel for the plaintiff in error contends, that the bequest is to Mrs. Sanders of one moiety in the legacy, and to her *children, as a class*, of one or more moieties dependent upon the number of members of the class who take under the will; or, to express it differently, that Mrs. Sanders is not comprehended in any class, but she and the *class*, i. e. her children, take under the will as tenants in common; that under the common-law rule the legacy would have lapsed, but that such lapse will be prevented by the Civil Code, § 3330, which provides: "If a legatee dies before the testator, or if dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportion as if inherited directly from their deceased ancestor." Mrs. Sanders' interest could not be enlarged or reduced by the number of the children, unless she is included in the class. If her share in the bequest is distinct to herself, then the only construction which could be placed on the will would be that she would take one half of the bequest and her children the other half, and such a construction would manifestly do violence to the testator's intention. A case in point is *Mitchell v. Mitchell* (Conn.), 47 Atl. 325. There the devise was to Lawrence Mitchell and his chil-

dren, and the court said: "The words in this part of the will, 'Lawrence Mitchell and his children,' standing alone, must be taken to mean Lawrence Mitchell and all his children. They can have no other meaning. It is a devise to a class. A class is a number of persons or things ranked together for some common purpose. Bou. Law Dict. And when a legacy is to a class, all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment. . . The class consists of Lawrence Mitchell and all his children." Mrs. Sanders was included in the class with her children, and her share in the legacy is measured by the number of her children surviving at the testator's death; and if none survive, she takes the whole estate bequeathed to herself and children. *Martin v. Trustees*, 98 Ga. 320. See also *Parker v. Churchill*, 104 Ga. 122. The section of the code on the subject of lapsed legacies, quoted above, has no application to the case where the legacy is to a class, and one or more of the class is in esse at the testator's death. It is only when all the members of the class predecease the testator that a lapse will be prevented by this code section. In *Cheney v. Selman*, 71 Ga. 384, the bequest was to the "children of Tilda Cleckler." Neither at the execution of the will nor at the death of the testator were there any children of Tilda Cleckler in life. She had one son, who was dead, but who left surviving him his children. Under these circumstances the court held that the son's children took under the will, by virtue of code section 3330. The rule is different where the devise is to a class and some members of the class survive the testator. The survivors take the entire legacy. *Davie v. Wynn*, 80 Ga. 673; *Tolbert v. Burns*, 82 Ga. 213; *Martin v. Trustees*, supra. The fact is admitted that the children of Mrs. Sanders died before the death of the testator. She was the sole survivor of the class, and took the entire legacy devised to her and her children.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

GEORGIA CO-OPERATIVE FIRE ASSOCIATION *v.*
BORCHARDT & COMPANY.

1. The assignment of a fire-insurance policy without the consent of the insurer, after a loss has occurred thereunder, does not render the policy void, but the assignee has the right to bring an action thereon.
2. Such an assignment is valid without the consent of the insurer, although the written transfer of the policy purports by its terms to be subject to the consent of the insurer.
3. Properly construed, the suit in the present case was upon the insurance policies, and not upon a written adjustment of the loss and a promise in writing by the defendant to pay the amount shown by the adjustment.
4. The name, "The Georgia Co-operative Fire Association," by which the defendant was sued, taken in connection with the allegations in the petition, that "the defendant insurance company or association [had] an agent and a place of doing business in the" county wherein the suit was brought, and on a named date issued "its certain policy of fire insurance whereby and by the terms of which it insured against loss by fire" certain property, imported a corporation; and it was not necessary, even as against a special demurrer, to allege the corporate existence of the defendant.
5. An assignment of error in exceptions pendente lite or in a motion for a new trial, that the court erred in refusing to sustain a motion to rule out the testimony of a named witness, does not properly present any question for determination by this court, when the testimony in question is not, either literally or substantially, set forth in connection with the assignment of error in such exceptions or in the ground of the motion for a new trial complaining of the ruling of the court, and no statement thereof is attached as an exhibit to the exceptions or to the motion.
6. In a suit upon a fire-insurance policy, brought by an assignee of such policy against the company which issued it, the defendant can not be held bound by an adjustment of a loss sustained under the policy, made after the assignment, between the insurer and the assignor of the policy, unless in such adjustment the assignor acted as the authorized agent of the assignee.

Submitted January 30, — Decided June 14, 1905.

Action on insurance policy. Before Judge Gale. City court of Brunswick. June 25, 1904.

Ernest Dart, for plaintiff in error.

C. P. Goodyear and *Max Isaac*, contra.

FISH, P. J. Benjamin Borchardt & Company, a firm composed of Benjamin Borchardt and Albert Fendig, brought an action in the city court of Brunswick, against "The Georgia Co-operative Fire Association," on two fire-insurance policies, alleging that "the defendant insurance company or association had an agent or place of doing business in the county of Glynn.

Both of the policies were alleged to have been issued by the defendant upon a certain stock of groceries and the store fixtures contained in a described building in the city of Brunswick, one of them having been issued on July 6, 1903, to H. H. Brady and by him subsequently transferred, with the consent of the defendant, to L. Bordeaux, and the other having been issued by the defendant on August 17, 1903, to said Bordeaux. The first policy was alleged to have been issued "in consideration of a membership fee of eighty cents and a monthly assessment of eighty cents," and the other "in consideration of a membership fee of forty cents and a monthly assessment of forty cents," the older policy being in the sum of \$400, and the other in the sum of \$200. It was alleged, that the premiums on each policy had been paid for a full term of one year, and that on October 24, 1903, a fire occurred which totally destroyed the property insured, which then belonged to Bordeaux. It was further alleged that after the fire "an adjuster of said association came to Brunswick and adjusted said fire loss with the said L. Bordeaux in writing for the sum of" \$333.14, "and agreed to pay it within a reasonable time," which sum the plaintiffs were entitled to receive by reason of an assignment, dated October 26, 1903, of each of said policies, of which assignment the said association had due notice. It was further alleged, that the adjustment created this sum a liquidated demand, and that the association had neglected and refused to pay the same to either Bordeaux or the plaintiffs. Copies of the material portions of the two policies were attached to the petition as exhibits, and the several assignments referred to were also attached. The defendant filed both general and special demurrers, and, subject thereto, answered. The court overruled the demurrers, and upon the trial there was a verdict for the plaintiffs. The defendant had duly filed exceptions pendente lite to the overruling of the demurrers and also to certain other rulings made during the trial; and, after the verdict, made a motion for a new trial, which the court overruled. In the bill of exceptions error is assigned upon the exceptions pendente lite and also upon the judgment refusing the new trial.

1. The petition was demurred to upon the ground that no cause of action was set forth therein in favor of anybody, and

upon the further ground that the facts set forth therein showed that the plaintiff had no legal right to institute and maintain the suit. It needs no argument to demonstrate that a cause of action was set out in the petition. The only ground urged here in support of the contention that the petition did not show a cause of action in favor of anybody is that the transfers of the policies to the plaintiff, without the consent of the insurer, rendered them void, and section 2102 of the Civil Code is cited to support such contention. That section provides that "An alienation of the property, and a transfer of the policy, without the consent of the insurer, voids it;" but this section is not applicable after a loss occurs. "After the loss occurs, a sale of the property and transfer of the policy does not affect the liability of the insurer, but the assignee may recover." § 2105.

2. The contention that the petition showed no right of recovery in the plaintiff, because each of the written transfers to it was "subject to the consent of the Georgia Co-operative Fire Association," and such consent was not alleged, is without merit. As the section of the Civil Code last cited shows, no consent of the insurer was necessary to render valid assignments of the policies occurring after the loss. After the loss, the claim of the insured, like any other chose in action, could be assigned without in any way affecting the insurer's liability. Civil Code, § 2105; May, Ins. 468; Wood, Ins. 189. It has been held, rightly we think, that a condition in a policy of fire insurance prohibiting an assignment or transfer of the same after loss, without the consent of the insurer, is null and void, as inconsistent with the covenant of indemnity and contrary to public policy. Joyce, Ins. §§ 904, 2322; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252; Alkan v. New Hampshire Ins. Co., 53 Wis. 136; Goit v. Ins. Co., 25 Barb. (N. Y.) 189; Courtney v. Ins. Co., 28 Barb. 116; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289. The policies of insurance having been assigned after loss, the assignee simply stood in the shoes of the assignor, and any valid defense which the insurer might have had against the insured could be set up against the assignee. No right of the insurer being affected by the assignments of the policies, it would be a mere act of caprice or bad faith for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such con-

sent in order to defeat the claim of the assignee. The assignments being perfectly valid without the consent of the insurer, and its rights being in no way affected thereby, the condition in question was superfluous, and the law will not tolerate its enforcement against the assignee. The words, "subject to the consent of the Georgia Co-operative Fire Association," are to be treated as mere surplusage. Doubtless the assignor, by mere inadvertence or mistake, merely filled out a blank form on the back of the policy for an assignment before loss, or followed the wording of the previous assignment of one of the policies, before loss, to himself.

3. One ground of the special demurrer was, that the petition declared upon a written adjustment of the loss and a special promise in writing by the defendant to pay the amount of such adjustment, and that no copy of the adjustment or of such written promise was attached to the petition, and therefore the suit should be dismissed. We agree with the view taken by the defendant in other grounds of its demurrers, that is, that this was a suit upon the insurance policies, and not upon a written promise to pay the specific amount shown by the written adjustment of the loss. In the first place, the petition did not allege that the defendant or its adjuster promised in writing to pay the amount of the adjustment, or any other amount. The allegation was, that the adjuster of the defendant had "adjusted said fire loss with the said Bordeaux in writing for the sum of three hundred and thirty-three" dollars and fourteen cents "and agreed to pay it within a reasonable time." From this it appeared that the adjustment was in writing, but whether the agreement to pay the amount thereof was in writing did not appear. There was no allegation that anything had been assigned to the plaintiffs except the policies, nor did it even appear whether the assignments of the policies occurred before or after the adjustment; and the right of the plaintiffs to receive the amount fixed by the adjustment was alleged to be "by reason of an assignment of each of said policies, . . . of which assignment the said association had due notice." It is true that in one paragraph of the petition it was alleged, "that although said association had promised to pay said sum of three hundred and thirty-three dollars and fourteen cents aforesaid, within a reasonable time, as

the satisfaction of said loss, said company or association has wholly neglected and refused to pay same to this date, or any part thereof, to either the said L. Bordeaux or these petitioners; and petitioners further show that the said adjustment created this a liquidated demand;" and this allegation as to the amount sued for being a liquidated demand is relied on in support of the ground of the demurrer now under consideration. But this does not show that the plaintiffs were not suing on the contracts contained in the policies. We understand a liquidated demand to be one "where by agreement or otherwise the sum to be paid is fixed or certain." Civil Code, § 2884. So the mere allegation that the adjustment created this a liquidated demand, without more, simply amounts to an averment that the amount of the liability of the insurer upon the policies had, by reason of the adjustment, become fixed and certain. The amount of the insurer's liability might well have been liquidated without in any wise interfering with the right of the insured, or of one to whom the policy had been assigned after a loss, to bring an action upon a breach of the covenants contained in the policies.

4. There was a special demurrer upon the ground that it was not alleged in the petition whether the defendant was a corporation, partnership, or natural person. In *Mattox v. State*, 115 Ga. 212, the accused was indicted for the offense of simple larceny, the indictment alleging that the owner of the property alleged to have been stolen was the Acme Brewing Company. A demurrer was filed upon the ground that the indictment was defective, for the reason that it did not set forth the ownership of the property, as the term "Acme Brewing Company" was not the name of an individual, and did not import either a partnership or a corporation. The demurrer was overruled, and the accused was tried and convicted. This court held that the name "Acme Brewing Company" imported a corporation, and that "Where in an indictment for larceny the ownership of the goods alleged to have been stolen is laid in a name which imports a corporation, the presumption is that it is the name of a corporation, and it is not necessary, even as against a special demurrer, to allege the fact of incorporation." In *Holcomb v. Cable Company*, 119 Ga. 466, it was held that the name, "The Cable Company," imports a corporation, and that "when the

name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect, which prevails until the contrary is shown." This ruling was likewise made upon a special demurrer. So if the name, "The Georgia Co-operative Fire Association," imports a corporation, or does so when considered in connection with allegations in the petition, it is clear from these decisions, one rendered in a criminal case and the other in a civil case, that, even as against a special demurrer, it was not necessary to allege whether the defendant was a corporation, partnership, or natural person. It is perfectly evident that the name is not that of an individual. It is also evident that this name, when taken in connection with the allegations that "The defendant insurance company or association had an agent and place of doing business in [Glynn] county," and, on named dates, issued "its certain [policies] of fire insurance, whereby and by the terms of which it insured," etc., imports either a firm or a corporation; as an entity, not an individual, engaged in carrying on business, must be the one or the other. The name itself is more appropriate to a corporation than to a partnership, for the name of no individual is disclosed therein. It is clear, from previous decisions of this court, that if the defendant had been engaged in carrying on a regular business under the name, "The Georgia Co-operative Fire Company," the name, thus used, would have imported a corporation. *Wilson v. Sprague Mowing Machine Company*, 55 Ga. 671; *Cribb v. Waycross Lumber Company*, 82 Ga. 597; *Smith v. Columbia Jewelry Company*, 114 Ga. 698; *Mattox v. State*, supra; *Perkins Company v. Shewmake*, 119 Ga. 617; *Holcomb v. Cable Company*, supra; *Turner's Chapel A. M. E. Church v. Lord Lumber Company*, 121 Ga. 376. In each of those cases the name ended with the word "Company," which was not preceded by the conjunction "and," as is usual in partnership names. We can see no reason for making a distinction between the words "company" and "association," when they are respectively used to designate an entity engaged in carrying on business and making contracts. Each of the words is used in defining the other. One of the meanings of the word "company" is "An association of persons for the purpose of carrying on some enterprise or business;" and one of the meanings of the word "association" is a union of persons

in a company or society for some particular purpose." Webst. Dict. So the word "association," when used with descriptive adjectives as the name of a business entity, is as much indicative of a corporation as the word "company" when so used. Other courts, in determining whether a particular name imported a corporation, have made no distinction between these two words. *Stein v. Indianapolis Building etc. Association*, 18 Ind. 237; *Odd Fellows Building Association v. Hogan*, 28 Ark. 261. We are of the opinion that the name by which the defendant was sued, when considered in the light of the allegations of the petition, imported a corporation; and there was, therefore, no error in overruling the special demurrer in question.

5. In the exceptions pendente lite, and in one ground of the motion for a new trial, error is assigned upon the refusal of the court, upon motion of the defendant, to rule out all of the testimony of a named witness for the plaintiff. What the testimony of this witness was neither appears in connection with the assignment of error in the exceptions pendente lite nor in the ground of the motion for a new trial complaining of this ruling of the court, and no statement of such testimony is attached to the exceptions or to the motion as an exhibit. Under numerous rulings of this court, therefore, this assignment of error can not be considered.

6. One ground of the motion was, "that the court erred in ruling that the assignment of the policy was sufficient, valid, and legal, and that the sole issue in the case was whether there had been an adjustment of the loss and a promise to pay a specific amount in settlement thereof." One assignment of error upon this charge is, that there were other issues raised by the defendant's plea besides the question as to whether there had been an adjustment of the loss. Another ground was, that the court erred in charging that "if the defendant company, through its agent, Mr. Wilcox, agreed with Bordeaux that his loss sustained amounted to the sum of three hundred and thirty-three dollars and fourteen cents, and agreed to pay that amount in settlement thereof, then the plaintiffs in this case, B. Borchardt & Company, the transferees of these two policies from L. Bordeaux, would be entitled to recover that amount, and would be entitled to recover interest on such amount from the date of the agreement or

adjustment until the same was paid, at the rate of seven per cent. per annum." One assignment of error upon this instruction is, that the plaintiffs "could not recover under an agreement with Bordeaux to pay Bordeaux, unless the agreement to pay was itself transferred to Borchardt & Company." Another ground was, that the court erred in charging that if the jury believed that the plaintiffs had, by a preponderance of the evidence, established that the defendant agreed with Bordeaux that the amount of the loss sustained by him under the terms of the policies was three hundred and thirty-three dollars and fourteen cents, and agreed to pay that amount in settlement of the same, it would be the duty of the jury to find in favor of the plaintiffs the full amount of three hundred and thirty-three dollars and fourteen cents, with interest from the date of the adjustment. Error is assigned upon this instruction, because "the evidence disclosed no legal right of Borchardt & Company to recover a sum agreed to be paid to Bordeaux," and because the charge "placed upon the plaintiffs no burden whatever of showing any connection between Bordeaux and themselves, in order to recover, although the evidence showed no contract or other relation existed between the plaintiffs and the defendant." It is evident, from these instructions, that the court tried the case upon the theory presented in the plaintiffs' petition, that is, that if there was an adjustment of the loss between an authorized agent of the insurer and Bordeaux, the insured, such adjustment was conclusive upon the insurer as to its liability and the amount thereof, in a suit upon the policies, not by Bordeaux, but by Borchardt & Company, to whom the policies had been transferred, before the adjustment, by Bordeaux. Whatever effect the adjustment might have had if it had been made between Borchardt & Company and the insurance company, it seems to us very clear that, in a suit by Borchardt & Company against the insurer, an adjustment of the loss by an agent of the latter with Bordeaux, occurring after he had assigned all his interest in the policies to the plaintiffs, could not be conclusive upon the defendant upon the question of its liability and the amount of the same. Possibly it might in such a suit be used as evidence in the nature of an admission of liability by the insurer, but it could rise to no higher dignity than that. In order for the

adjustment, when made, to be binding upon the insurance company, it had to be also binding upon the then legal owner of the policies. It could not bind one of these parties unless it bound the other. The evidence showed that the general manager and adjuster of the insurer, when he went to Brunswick to adjust the loss, refused to recognize the validity of the assignments of the policies to Borchardt & Company, and hence declined to have any dealings with a member of that firm in connection with the adjustment of the loss. All his dealings in this respect were with Bordeaux, who was not shown by the evidence to have had any authority to represent and bind the firm to which he had previously assigned the policies. Indeed it was not shown that he even assumed to act as the agent of Borchardt & Company. Under the evidence, an adjustment of the loss between the insurance company and Bordeaux was not equivalent to an adjustment between the insurer and the assignees of the policies; and a promise by the insurer to Bordeaux was not a promise to Borchardt & Company. Besides, the charges complained of assumed that in this suit the defendant company would be bound by an adjustment of the loss by the insurer with Bordeaux, whether he was acting as agent of the plaintiffs or not, and, upon this assumption, the jury were instructed to find for the plaintiffs the full amount sued for, if they believed, from the evidence, that the loss had been adjusted at this sum by the defendant with Bordeaux.

The following cases are authority, if any can be needed, for the proposition that Borchardt & Company were not bound by the adjustment between Bordeaux and the defendant company. *Fire Association of London v. Blum*, 63 Tex. 282; *American Central Ins. Co. v. Sweetser*, 116 Ind. 370; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Hall v. Fire Association of Philadelphia*, 64 N. H. 405; *Harrington v. Fitchburg Mutual Fire Ins. Co.*, 124 Mass. 126. In the Indiana case it was held: "The assignee of a policy of insurance is not bound by any agreement which the assignor may make with the insurance company, subsequent to the assignment, as to the amount which shall be accepted as a satisfaction of its liability." In the Texas case, as in the present one, the policy had been assigned after the loss occurred, and there was, after the assignment, an adjustment of the loss between the

insured and the insurance company, which the court held not to be binding on the assignee. In the other cases cited, the same principle was applied where the policy was made payable, in case of loss, to a creditor of the insured.

The claim of the plaintiffs against the defendant was, under the evidence, an unliquidated demand; the charges of the court expected to were erroneous, and a new trial must be granted.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., not presiding.

COTHRAN v. WITHAM.

C. executed the following contract: "This is to certify that I have this day bought of [W.] five shares of the capital stock of [a named bank], and in consideration of the price paid, and for value received, I hereby agree not to sell all or any part of the stock at any time, until I have first offered the same to [W.] in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors, and administrators in the above option and agreement." In a suit by W. against C. for the breach of the contract, *Held*: (1) The contract was not void for indefiniteness as to the time when it should become operative. (2) It was not unilateral. (3) The allegations of special damage were too general, vague, and speculative to be the basis of a recovery. (4) W. was entitled to recover nominal damages only.

Argued January 31, — Decided June 14, 1905.

Action for damages. Before Judge Reid. City court of Atlanta. January 4, 1904.

Brown & Randolph, for plaintiff in error.

Spencer R. Atkinson and *E. Winn Born*, contra.

FISH, P. J. W. S. Witham brought an action for damages against J. C. Cothran for the breach of the contract following:

STOCK OPTION.

"This is to certify that I have this day bought of W. S. Witham five (5) shares of the capital stock of the Bank of Cartersville, Ga., and in consideration of the price paid, and for value received, I hereby agree not to sell all or any part of the stock at any time, until I have first offered the same to W. S. Witham in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors, and administrators in the above option and agreement.

"Witness, T. H. Willis.

J. C. Cothran."

The petition alleged that the defendant sold the five shares of stock to other parties on March 16, 1903, without having first in any way offered them to the plaintiff. General damages were laid in the sum of five thousand dollars. Paragraph 9 of the petition was as follows: "(9) Your petitioner shows, that, by reason of the said sale of stock by said defendant, your petitioner lost, in the way of profits, \$300.00; that said sale forced your petitioner to buy six shares of the capital stock of said bank at the cost of \$15.00 per share over and above the book value of said stock, making \$90.00; that your petitioner's expenses were \$34.00 in the way of railroad fare and lawyer fees; that he was president and financial agent of the Bank of Cartersville, and on account of said breach of said option your petitioner lost control of said bank as president and financial agent, which positions paid your petitioner \$500.00 per year, thereby greatly damaging your petitioner to the extent of \$4,500." The petition was demurred to on the grounds: "(1) Said petition sets forth no cause of action. . . (2) The damages alleged to have been sustained in said petition are too remote and speculative to be the basis of any legal recovery. . . (3) Paragraph 9 of said petition fails to allege why it was necessary for the petitioner to buy six shares of the stock referred to therein, and from whom the same were bought, and fails to set forth the market value of the stock and the price paid by petitioner, and also fails to set forth what sum or sums were paid by petitioner by way of railroad fare, and to what railroad, and when and why; and said paragraph is too vague and indefinite, and there are no sufficient allegations therein to charge this defendant with liability for the repayment of any of the sums therein mentioned." To meet the demurrer, the ninth paragraph of the petition was amended, in substance, as follows: Plaintiff, at the time he sold the five shares of stock to the defendant and for a long period of time prior thereto, was president and financial agent of the Bank of Cartersville, and for his services as such he was entitled to and did receive the sum of \$500.00 per annum. In making the sale of the stock to the defendant, he reserved the right to repurchase the same, on the terms set out in the contract, for the purpose of retaining control of the majority of the stock, in order to secure his re-election to the presidency of the bank, all of which was well known to the

defendant. For the purpose of preventing the re-election of the plaintiff to the presidency of the bank, the defendant, without offering the five shares of stock to the plaintiff, who was willing to purchase them under the terms of the contract, sold them to other parties, who were opposed to the plaintiff's re-election, and by this means plaintiff, at the next annual election, was defeated for the presidency. The particulars of the purchase by the plaintiff of the six shares of stock and his expenses incident thereto, mentioned in the ninth paragraph of the original petition, were fully set out in the amendment. It was further alleged in the amendment, "that it was necessary, in order for him to protect his rights in the premises, to give notice of his rights in respect of said shares of stock [the five shares he sold to defendant] to said bank, with notice not to transfer the said shares upon the books of said company; that it was necessary for him to employ counsel for said purpose, and . . . for said services he paid [named counsel] the sum of \$25.00, the same being in all respects a reasonable charge for the services in that respect rendered;" and that by the breach of the contract by the defendant the plaintiff had been injured and damaged, "in manner and by means aforesaid, in the sum herein mentioned." The amendment was allowed subject to demurrer. The demurrers previously filed were urged against the petition as amended. The demurrers were overruled, except as to the damages sought to be recovered on account of the purchase by the plaintiff of the six shares of stock and expenses incident thereto, and all allegations in the original petition and in the amendment thereto in reference to this matter were stricken. The defendant excepted to the overruling of the general demurrer, and of the special demurrer as to matters other than the purchase of the six shares of stock by the plaintiff. Counsel for the plaintiff in error insist here that the court erred in overruling the general demurrer, for three reasons: (1) The contract for the breach of which the action was brought "was void for uncertainty and indefiniteness, there being no time fixed in the contract within which it was to become operative." (2) It was unilateral, in that only Cothran was bound by its terms. (3) The damages sought to be recovered are too remote and speculative, and do not flow logically and proximately from a breach of the contract.

1. The contract was not void for uncertainty and indefiniteness in that no time was fixed for it to become operative. Such a time was fixed in express terms, viz., whenever Cothran decided to sell; then, before selling to another than Witham, he was to offer the stock to Witham, in writing, at its book value. Counsel for the plaintiff in error also argued that the contract was against the policy of the law, in that it placed an indefinite restriction upon the alienation of the stock, and violated "the rule against perpetuities." We can not concede the soundness of this argument, as we think it clear that the right of Cothran to sell the stock at any time he might see fit was not restricted, save that before selling it to one other than Witham he was bound to offer it to the latter, in writing, at its book value; and that in any event the contract would have terminated upon the death of Witham.

2. The contract was not unilateral. The agreement of Cothran to offer the stock to Witham, at its book value, before selling it to another, appears to have been part of the transaction of the sale of the stock by Witham to Cothran, and to have entered into its consideration. In view of the terms of the contract, it is presumable that Witham would not have sold the stock to Cothran at the price at which the latter bought, if Cothran had not agreed that before he sold to another he would give Witham the right to repurchase upon the terms stated. See *Hayes v. O'Brien*, 23 L. R. A. 555.

3. The allegations as to the loss of \$300 profits were too general, and the special demurrer thereto should have been sustained. Under the provisions of the Civil Code, § 3799, the fee of \$25 paid to attorneys for notifying the bank not to transfer on its books the stock sold by Cothran was clearly not recoverable, and the special demurrer to the allegation setting it out should have been sustained.

4. For the breach of a contract by one party the other may recover nominal damages. Civil Code, § 3801. Witham, therefore, was entitled to recover nominal damages for the breach of the contract. The allegations of damage on account of his defeat for the office of president and financial agent of the bank at the election next succeeding the alleged breach of the contract by Cothran, however, were too contingent and specu-

lative to be the basis of a recovery. It was not alleged that had Cothran retained the stock he was under any obligation, legal or otherwise, to vote it for Witham in the election of officers. Apparently there was no restriction on his right to vote it for whomsoever he chose. Nor was he under any obligation to sell the stock to Witham before the election took place, thus putting it in Witham's power to control the stock independently of him. In order to recover damages on these allegations, then, one of two alternatives must be assumed, viz, either that Cothran would have sold the stock to Witham before the election if he had not sold it to the parties to whom he did sell; or that, in the event he had not sold the stock at all, he would have voted it for Witham for president and financial officer of the bank. In the nature of things, neither of these alternatives is susceptible of proof. It follows that, under the allegations of the petition, Witham is entitled only to nominal damages for the breach of the contract, and that the defendant's special demurrer should have been sustained.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., not presiding.

EDMONDSON v. THE STATE (two cases).

1. Neither under the act of 1885 (Acts 1884-5, p. 475, § 80), nor under the constitutional provisions allowing the judge of the superior court to preside in the city court in cases where the judge of the latter is disqualified to preside, did the judge of the superior court of the Macon circuit have authority to administer an oath and attest an affidavit made as a basis for an accusation in the city court of Macon, on the ground that the judge of the latter court was disqualified from attesting the affidavit because of relationship to the defendant. A judgment based upon such an affidavit and accusation should be arrested on motion.
2. The case being controlled by the foregoing ruling, the writ of error based on the overruling of the motion for new trial is dismissed, with direction that all proceedings in the case be vacated.

Argued May, 16—Decided June 14, 1905.

Accusation of carrying concealed weapons. Before Judge Clark. City court of Macon. March 29, 1905.

An affidavit was made before the judge of the city court of Macon, as a foundation for an accusation charging the defend-

ant with the offense of carrying a concealed weapon, under the act of August 14, 1885, creating the city court of Macon (Acts of 1884-5, pp. 475-6). The defendant was related to the judge of that court. The judge considered himself disqualified to act, and an application was made to the judge of the superior court of the circuit. He administered the oath to the prosecutor and attested the affidavit, and upon it an accusation was framed. When the case came on for trial the judge of the superior court was absent. The judge of the city court passed an order declaring himself disqualified and calling upon the judge of the city court of Forsyth to preside and dispose of the case for him. The last-named judge presided, and after conviction the defendant made a motion in arrest of judgment, one ground being, because the affidavit on which the accusation was based showed on its face that it was sworn out before the judge of the superior court of the Macon circuit without authority of law, and that the accusation and conviction based thereon were illegal. There was another ground of the motion, which need not be set out. The defendant also made a motion for a new trial. Both motions were overruled, and the defendant excepted.

M. G. Bayne, for plaintiff in error.

William Brunson, solicitor-general, contra.

LUMPKIN, J. (After stating the facts.) 1. The act of August 14, 1885 (Acts 1884-5, pp. 475-6, § 30), provides, "That the defendants in criminal cases in said city court of Macon may be tried on written accusation setting forth plainly the offense charged, founded on affidavit made by the prosecutor; said affidavit shall be made before said judge, and said accusation shall be signed by the prosecutor and the prosecuting officer in said court." It is contended that the judge of the city court was disqualified from taking and attesting the affidavit, because of his relationship to the defendant. It is not altogether certain that there was any disqualification so far as administering the oath and attesting the affidavit were concerned, although the judge was disqualified from presiding on the trial of the case. See, on this subject, *Thornton v. Wilson*, 55 Ga. 607; *Savage v. Oliver*, 110 Ga. 636, 638, and cases cited; 17 Am. & Eng. E. L. (2d ed.) 753; Civil Code, § 4045. On the subject of the disqualification

of ministerial officers, see *Herring v. State*, 119 Ga. 710, 715; *Ex parte Gist*, 26 Ala. 156, 161; *Flury v. Grimes*, 52 Ga. 341; *State v. Jeter*, 60 Ga. 489; *Johnson v. Shurley*, 58 Ga. 417. It is unnecessary to decide whether the judge of the city court of Macon was qualified to administer the oath and attest the affidavit or not. In any event, no authority was conferred by the act of 1885 upon the judge of the superior court to do so. The constitution authorizes the judge of the city court and the judge of the superior court to preside in the courts of each other respectively, in cases where either is disqualified, in any county where a city court exists (Civil Code, § 5851); but where a legislative act provides that a prosecution in a certain city court shall be begun by affidavit made by the prosecutor, which shall be made before the judge of that court, the constitutional provision referred to does not of itself authorize the judge of the superior court of the circuit to take and attest such an affidavit on the ground that the judge of the city court is disqualified from acting, by reason of relationship to the defendant. This is not presiding in a case in the city court, within the meaning of the constitution. *Northwestern Mut. Life Ins. Co. v. Wilcoxon*, 64 Ga. 556; *Ivey v. State*, 112 Ga. 175. The affidavit made before the judge of the superior court and attested by him, and the accusation based thereon, being without authority of law, the judgment should have been arrested on motion.

2. On the trial the judge of the city court of Forsyth presided at the request of the judge of the city court of Macon, on the ground that the latter was disqualified. Acts 1899, p. 48. Inasmuch as the ruling above made controls the entire case, it would be useless to refer to the rulings made on the trial. The writ of error bringing up the overruling of the motion for a new trial is dismissed, with direction that all proceedings in the case be vacated.

Judgment reversed in the first case; writ of error dismissed in the second case, with direction. All the Justices concur, except Simmons, C. J., absent.

MOSELEY v. SCHOFIELD'S SONS COMPANY.

1. In a suit for damages on account of personal injuries, brought by a servant against his master, where, among various allegations of negligence, it is charged that the defendant failed to furnish the plaintiff a safe place in which to work, and it affirmatively appears from the petition that the plaintiff's injuries were not caused by the character of the place in which he was put to work, or in any manner connected therewith, such an allegation of negligence can not be made the basis of a recovery.
2. A master is liable for injuries to his servant caused by the concurrent negligence of a vice-principal of the master and fellow-servants of the servant injured.
3. The petition in the present case was not open to the objection that it did not make it appear that the servant was himself free from fault, or that he had not equal means with the master of knowing of the defective condition of the appliance which caused his injuries.

Argued April 10, — Decided June 14, 1905.

Action for damages. Before Judge Hodges. City court of Macon. October 1, 1904.

T. S. Felder and Arnold & Arnold, for plaintiff.

Malcolm D. Jones, for defendant.

CANDLER, J. This case comes up on exceptions to the sustaining of a demurrer to the plaintiff's petition. The material allegations of the petition were, in substance, as follows: The defendant, a corporation, is engaged in a general iron business, and in the business of erecting smokestacks and iron structures, taking contracts and subcontracts for that purpose. At a time designated, the defendant, as a subcontractor, was "doing certain work" upon the plant of a corporation in Alabama, and the plaintiff was employed by the defendant in connection with that work. He was a new man in the defendant's employment, having just been employed on the day before the occurrence out of which the suit arose, and having just gone to work on that day. He "was employed by the superintendent, or foreman, in charge of said work," and was told that his duties were to do such things as might be required of him. He was at first put to work helping unload a car of material, but subsequently one of the defendant's employees engaged in working on the smokestack quit, and the superintendent ordered the plaintiff to take his place. Accordingly, he mounted the structure through which the stack went. This structure was de-

scribed more or less minutely, but its description has little bearing upon the questions at issue. At the top of the smokestack was a pole, or shaft, and at the end of this was a block, or pulley, over which a rope ran. One end of the rope was pulled by an employee standing on the brick structure already mentioned, while the other end, which had a hook in it, was attached to a piece of steel or iron, and by this means the different parts of the smokestack were raised into position. The plaintiff was a newcomer, and was not familiar with the appliances which the defendant was using. He was ordered to pull the rope, for the purpose of raising the iron sheet up the stack to a point where other employees were to work on it. While he was engaged in this work, the iron dropped from the hook and fell upon him, inflicting injuries for which he sued. The allegations of negligence were as follows: "Defendant was negligent in divers particulars. Defendant failed to exercise ordinary care in furnishing plaintiff a safe place in which to work. Defendant's superintendent and employees other than plaintiff had negligently put a weak and defective hook at the end of the rope where it was attached to the said piece of iron. The said hook, being a thin piece of wire bent up, and being only about one eighth of an inch in diameter, was wholly inadequate to hold the said piece of iron, which piece of iron weighed about one hundred and fifty pounds. And when the said sheet of iron was being lifted up, the said hook, on account of its inadequacy and weakness, bent out, lost its shape, and straightened and bent to such an extent that the iron slipped and pulled off of it. Plaintiff had no knowledge of said defective condition, and had not hooked the hook to the iron piece, and was a newcomer, and was not aware of the danger he was placed in. Defendant failed to exercise ordinary care in using said weak and inadequate hook. Defendant's superintendent and other employees at work knew that the said hook was defective, and had warning thereof, but failed to secure a good and strong one. Defendant's employees negligently placed a sheet of iron weighing one hundred and fifty pounds or thereabouts on said hook. Defendant failed to furnish plaintiff a safe place in which to work. In all these particulars defendant was negligent." The demurrer was upon the grounds that (1) no cause of action was set out; (2) the petition fails to

show that the plaintiff was free from fault; (3) it affirmatively appears that the plaintiff was at fault; (4) the petition fails to show that by the exercise of ordinary and reasonable diligence the plaintiff could not have avoided the injury complained of; (5) it affirmatively appears that the defect in the hook alleged to have caused the injury was patent, and could have been discovered by the plaintiff by the exercise of ordinary diligence; (6) the petition fails to show that the plaintiff did not have equal means with the defendant of knowing of the defect in the hook; and (7) the petition shows that the injury complained of was due to the negligence of the plaintiff's fellow-servants. The defendant also demurred specially to the following language in the ninth paragraph of the petition: "Defendant was negligent in divers particulars. Defendant failed to exercise ordinary care and in furnishing plaintiff a safe place in which to work."

1. It will be observed from a reading of the allegations of negligence contained in the petition, which we have quoted in full, that the charge that the defendant failed to furnish the plaintiff a safe place in which to work is repeated, being contained in two different paragraphs of the petition. The special demurrer went only to one of these paragraphs, and so, even if sustained, would leave this charge of negligence still in the petition. It may be conceded, however, that the place where the plaintiff was put to work by his employer was all that it was intended to charge against it, and the plaintiff could not recover on these allegations; for it affirmatively appears that the injury of which he complains was in no way due to the character of the place in which he was put to work. The use of a defective appliance was, according to his petition, the real cause of his injuries. It is therefore unnecessary to discuss further the allegations that the defendant was negligent in failing to provide a safe place for the plaintiff to work; for it needs no citation of authority to sustain the proposition that negligence, to be the basis of a recovery, must be connected with the injury which is the subject of the suit.

2, 3. The grounds of the demurrer which are general in their nature may, for the sake of convenience, be divided into two general classes, viz., those which attack the petition on the ground that it does not show that the plaintiff was himself free from fault; and those which contend that it appears from the petition

that the plaintiff's injuries were the result of the negligence of a fellow-servant, for which the master is not liable. Considering the last contention first, we think it clear that the allegations of the petition were sufficient to put the defendant on proof as to the real authority of its alleged superintendent. While that individual is described as a "superintendent, or foreman," and while neither of these words necessarily imports that the one to whom they were applied was the alter ego of the defendant, it was alleged that he had authority to employ laborers, and was in charge of the work; and under repeated rulings of this court, such a person would be the vice-principal of the master. *Atlanta Cotton Factory v. Speer*, 69 Ga. 137; *Woodson v. Johnston*, 109 Ga. 454; *Taylor v. Georgia Marble Co.*, 99 Ga. 512. The fact that the plaintiff's injuries were caused by the concurrent negligence of the vice-principal and other employees of the defendant, who were undeniably fellow-servants of the plaintiff, would not relieve the master from liability. *Jackson v. Merchants Trans. Co.*, 118 Ga. 651. Nor do we think there is any merit in the grounds of the demurrer which attack the petition upon the idea that it was not alleged that the plaintiff himself was free from fault. It appears that the plaintiff was a newcomer; that he had been employed only the day before his injuries were received, and was put to work on that very day; that he had not had an opportunity to become familiar with the appliances in use by the defendant; that he had just been ordered from one piece of work to the one in performing which he was injured; and that he was bound to rely upon the diligence of the superintendent in furnishing him safe appliances with which to work. It can not be said as a matter of law that the plaintiff was obliged to know that the hook used in lifting the heavy sheets of iron was insufficient for the purpose for which it was used. That was a question for the jury to determine. We conclude that the court erred in sustaining the demurrer to the petition.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

WELLMAKER v. WHEATLEY.

1. A paper recited that A had rented to B a farm for a given year, "with the refusal of buying it next fall for the sum of six dollars per acre," and provided that if B "does not take the place," any buildings which he is compelled to have shall be paid for by A at a reasonable price, if they "do not trade." *Held*, that the legal effect of the paper was to rent the farm to B and to give him the option of purchasing it at the time and price stated.
2. In a writing which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other; and in such a case proof of a consideration different from that expressed in the writing might alter its terms and conditions; and when it would have this effect, parol proof would be inadmissible to change or alter the consideration, or to show that it was not applicable to the promise to which, on the face of the contract, it appeared to apply.
3. In the absence of proper pleadings asking for a reformation of a written contract, parol evidence is inadmissible to show that the contract does not set forth the real undertaking entered into by the parties.
4. In a suit by the vendee to compel the specific performance of a contract for the sale of land, it is not necessary that the petition should allege that the vendee has tendered a deed for execution by the vendor, unless, under the terms of the contract, the preparation of the deed devolved upon the vendee.
5. A contract recited that A had rented B's place, which was not otherwise described, and provided that A should have an option to purchase the place at a stated amount. *Held*, that parol evidence could be admitted to identify the place referred to in the contract.
6. There was no error in overruling the demurrer to the petition, nor in refusing to grant a new trial.

Submitted April 13, — Decided June 14, 1905.

Action for specific performance. Before Judge Holden.
Lincoln superior court. November 26, 1904.

T. H. Remsen and *John T. West*, for plaintiff in error, cited 88 Ga. 321; 104 Ga. 162; 111 Ga. 455; 115 Ga. 408; 116 Ga. 741; 6 L. R. A. 33; 11 Id. 805; 21 Id. 127, 132; 68 Ala. 124; 91 Ind. 151; 90 Mo. 184; 10 West. R. 564; 42 N. W. 962; 73 Ill. 453; 134 Mass. 555; 2 A. K. Marsh. 345; 125 Ill. 85; 1 A. & E. Enc. L. (1st ed.) 438.

J. M. Pitner and *F. H. Colley*, contra, cited 111 Ga. 455; 43 Ga. 427; 52 Ga. 448; 65 Ga. 657; 101 Ga. 42; 118 Ga. 920; Civil Code, §§ 3675, 5201.

COBB, J. Wheatley brought an action for the specific performance of an alleged contract for the purchase of land. The

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petition alleged the making of the contract, a tender of the purchase-money, and the refusal of the defendant to accept the same and make the plaintiff a deed. The defendant demurred to the petition, on the grounds, that no cause of action is set forth; the contract is unilateral; the petition fails to allege that the contract was in writing; and there is no allegation that the plaintiff prepared and tendered a deed to the defendant. The petition was amended, and a writing of which the following is a copy was set forth as the contract relied on: "September 19th, 1902. This is to certify that C. W. Wheatley has rented Miss Lowe Wellmaker's place for one thousand pounds of lint cotton for the year 1903, with the refusal of buying it next fall for the sum of six dollars per acre. Said place is to be controlled and protected by said C. W. Wheatley just the same as if it belonged to him. The said C. W. Wheatley agrees to take care of the lands, clear what he can free of charge. If he does not take the place, what buildings he is compelled to have, if any, are to be paid for by Miss Lowe Wellmaker at a reasonable price, if we do not trade. [Signed] C. W. Wheatley, Lowe Wellmaker." The defendant renewed her demurrer, and, the same being overruled, excepted *pendente lite*. In her answer she admitted the execution of the paper, but denied that it constituted an enforceable contract, averring that it was unilateral and without consideration. A verdict was returned in favor of the plaintiff; and the defendant's motion for a new trial being overruled, she excepted.

1. The proper construction of the paper relied on by the plaintiff as a contract is that the defendant rented the land to the plaintiff for the year 1903, and gave him an option to purchase. It has been held that an agreement by a lessor to give a lessee, at the end of the term, the "refusal" of the premises for another definite term, was merely an expression of preference for the lessee over others, and did not bind the lessor to renew the lease. *Arkansas Pass Land Co. v. Hanaford*, 4 Tex. Civ. App. 236. A similar construction of the word was given in a case where one person promised to give another "the refusal [of land] when he sold." *Deere v. Nelson*, 73 Iowa, 188. On the other hand, it has been expressly held that an agreement in a lease to give the lessee "the refusal" for another term bound the lessor to rent to the lessee for that term, upon the same terms and conditions as

for the first term. *Steen v. Schell*, 46 Neb. 252; *McAdoo v. Callum*, 86 N. C. 419; *Tracy v. Albany Ex. Co.* (N. Y.), 57 Am. Dec. 538. "The refusal of buying [the land] next fall for the sum of six dollars per acre," and the agreement that the defendant is to pay for certain buildings, "if [the plaintiff] does not take the place," shows the intention of the parties to have been that the plaintiff was to have the option of buying at a fixed price and at a specified time. The expression "if we do not trade" evidently means the same thing as "if he does not take the place." The payment by the defendant for certain buildings is made to depend both upon the plaintiff's taking the place and upon the parties trading. These expressions were intended to convey the same idea, and to mean the same thing as "if the plaintiff does not exercise the option."

2. As a general rule, the consideration of a contract is open to inquiry as between the original parties, and even the consideration of a deed may be inquired into when the principles of justice require it. *Finney v. Cadwallader*, 55 Ga. 78; Civil Code, § 3599. But this rule is applicable only where the statement as to the consideration in the contract is merely by way of recital. The consideration may be so referred to in the contract as to make it one of its terms and conditions. When this is true, parol evidence is not admissible to vary the term, although the term relates to the consideration. The rule is thus stated in 6 American and English Enc. Law (p. 775): "When, however, the statement of the consideration leaves the field of mere recital and enters that of contract, thereby creating and attesting rights, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence." See also *Browne*, Parol Ev. § 31, p. 44. In a written contract which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other. In such a case proof of a consideration different from that expressed in the written instrument might alter its terms and conditions, and if it would, it is inadmissible. *Burke v. Napier*, 106 Ga. 329. The contract under consideration in the present case contains on its face mutual promises. There was a promise on the part of Wheatley to pay one thousand pounds of cotton, and

there was a promise on the part of Miss Wellmaker to give to Wheatley the use of the farm for a year, and the right to purchase it at a given sum per acre in the event he saw fit to do so during the fall of that year. It was on its face really a contract, for a stated consideration, to sell two things,—one year's use of the farm, and the right to buy the same upon given conditions. The subject-matter of the sale was double. It is proposed now to show by parol that the contract was not for the sale of two things but for only one, that is, that the consideration stated in the contract applied only to one of the subject-matters of the contract. A writing which on its face shows a contract to sell two things is certainly altered in its terms by parol evidence that there was a contract to sell only one thing. There was no error in excluding the parol evidence to show that the consideration as stated in the contract was applicable only to the agreement to rent.

3. There was no plea alleging that that portion of the contract in reference to the option was inserted as a result of fraud, accident, or mistake, and no prayer for a reformation of the contract; and therefore the evidence offered to show that the writing did not constitute the real undertaking of the parties was properly excluded.

4. When a vendor brings an action to compel the specific performance of a contract to buy land, it is incumbent upon him to show an offer of performance on his part by the tender of sufficient title deeds, or by offering to execute such a deed when its preparation does not, by the terms of the agreement, devolve upon the vendee. But in an application for specific performance by the vendee, it is not necessary to show that he presented a deed for execution, unless under the terms of the agreement the preparation of the deed devolved upon him. See *Emery v. Atlanta Exchange*, 88 Ga. 327.

5. Parol evidence is admissible to identify land which is the subject-matter of a contract and which is described in the contract merely in general terms, provided the general description is such as, in the light of parol evidence, to clearly identify the property. *Johnson v. McKay*, 119 Ga. 196. The contract in the present case referred to the land as "Miss Lowe Wellmaker's place." If this had been the only description of the land, parol

evidence would have been admissible to identify the land to which this description applied; but taking the contract as a whole the description is even more definite than this; for it in effect describes the land as Miss Lowe Wellmaker's place which she rented to C. W. Wheatley, and by parol evidence it can be definitely determined what is the place which is the subject-matter of the contract.

6. Applying the principles above laid down, there was no error in overruling the demurrer to the petition, nor in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

POOL v. WARREN COUNTY.

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1. It is incumbent on a party seeking to introduce hearsay evidence, as part of the *res gestæ*, to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought.
2. The word "immediately" is a relative expression; and it is not sufficient, in order to render declarations admissible as part of the *res gestæ*, to show that they were made "immediately" after the transaction, without showing, at least approximately, how nearly they were connected therewith in point of time.
3. A ground of a motion for a new trial, complaining of the admission of evidence, which does not show that the objections set out in the motion were raised at the time the evidence was offered, will not be considered.
4. In a suit against a county, a brother of one of the county commissioners was not disqualified to act as a juror, it appearing that the commissioner was not pecuniarily interested in the result of the suit other than as a citizen of the county, and that in defending the action he acted purely in his official capacity.
5. The evidence was conflicting, but was sufficient to authorize a finding that the bridge through which the plaintiff claimed to have been precipitated by reason of the defendant's negligence was built prior to the passage of the act approved December 29, 1888 (Acts 1888, p. 39), and that the county was therefore not liable for any injuries arising out of its defective condition.

Argued April 13, — Decided June 14, 1905.

Action for damages. Before Judge Holden. Warren superior court. November 1, 1904.

W. M. Hawes and Evans & Evans, for plaintiff.

E. P. Davis, for defendant.

CANDLER, J. Mrs. Pool sued the County of Warren for damages on account of injuries, alleged to have been sustained by her on account of the negligent construction of a bridge in the county and the negligent failure of the county to keep the bridge in reasonably safe repair, the bridge having given way while she and others were crossing it in a surrey, precipitating her to the water below and causing the injuries of which she complained. The jury found a verdict for the defendant; whereupon the plaintiff made a motion for a new trial, which was overruled, and she excepted.

1, 2. The court excluded the following evidence of the plaintiff's husband, offered in her behalf: "I knew my wife was hurt, because she complained, immediately after the accident, of being injured in her right side." It is contended that this was error, as the evidence offered was part of the *res gestæ*, and as such should have been admitted. Evidence of declarations of a person other than the witness is, as a general rule, inadmissible, as hearsay. An exception is made to this rule where the declarations accompany an act under investigation, or are "so nearly connected therewith in time as to be free from all suspicion of device or afterthought." Civil Code, § 5179. It is, of course, incumbent upon a party seeking to introduce hearsay evidence contrary to the general rule to lay the foundation for its introduction by showing that it is within the exception to the rule provided by law. In other words, one who seeks to introduce hearsay evidence, as part of the *res gestæ* of a transaction, must show that it is in fact part of the *res gestæ*. The word "immediately" is a relative term. It may mean a minute, an hour, a day, or a week, according to the circumstances of the case, or other periods of time which the witness has in mind when speaking. In the present case it was incumbent upon the plaintiff to show that the declarations sought to be introduced were so closely connected with the incident of her precipitation through the bridge as to be free from any suspicion of device or afterthought. We can not say that this was done by the use of the word "immediately." The witness could easily have told, approximately at least, how long after the accident it was that his wife made the complaints as to which he testified. It was not error to exclude the evidence offered.

3. The motion also complains that "court erred in permitting, over plaintiff's objection, counsel for the defendant to propound to, and [a named witness] to answer, the following hypothetical question." The question and answer are then set out at considerable length, after which the movant proceeds to criticize the ruling of the court admitting the evidence. It nowhere appears, however, that the objections made in the motion were raised on the trial of the case; and following its oft-repeated decisions, this court will not pass on any question in a motion for a new trial which does not affirmatively appear to have been passed on by the trial judge.

4. The county commissioners were not pecuniarily interested, as such, in the result of the suit. Every citizen of the county had the same interest as they. As officials it was their duty to defend the suit on behalf of the county, but their official character did not give them any greater interest in the result than if they had been private citizens. Therefore a brother of a county commissioner was no more disqualified to serve as a juror than would have been any citizen of the county. This case differs from *Dumas v. State*, 62 Ga. 58. There the county commissioner actively furthered the prosecution of the accused, and in doing so did acts which were not within the scope of his official duty. His nephew was held to be incompetent as a juror by reason of relationship, not on account of the commissioner's official connection with the prosecution, but because the commissioner acted otherwise than as an official. For, said the court (p. 64), the commissioner was to be regarded "as a volunteer prosecutor, and as having committed himself personally and in his private capacity to the side of the prosecution." See also *Augusta R. Co. v. McDade*, 105 Ga. 134; *Smith v. Smith*, 119 Ga. 239.

5. The sole issue of fact involved was whether or not the bridge through which the plaintiff fell was constructed prior to the passage of the act approved December 29, 1888 (Acts 1888, p. 39), providing that a county shall be primarily liable for injuries caused by reason of defective bridges; for it is admitted that if the bridge was built before that time, no liability attaches to the county for its defective condition. The man who built the bridge testified that the work was done in 1888 or 1899; his belief was that it was in 1889, but he could not

swear positively as to which year it was. He also testified that two or three months elapsed after the work was done before he was paid for it. The records of the county commissioners, introduced in evidence, showed that authority to rebuild the bridge was granted on November 6, 1888, and that the work was paid for May 5, 1891. There was evidence for the county that the bridge had been built as early as 1883 or 1884, and that it had never been washed away and rebuilt, as contended by the plaintiff, but had only been repaired from time to time as occasion required. It will thus be seen that there was a square conflict in the evidence. The issue of fact was fairly submitted to the jury, who found for the defendant. The trial judge was satisfied with the verdict, and this court will not disturb it.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Evans, J., disqualified.

CALLAWAY v. MAXWELL, administrator.

1. Where, in accordance with the provisions of the Civil Code, § 4720, a claim is filed to a fund sought to be reached by summons of garnishment in a suit in attachment, and bond is given to dissolve the garnishment, the claimant becomes, under the Civil Code, § 4723, a party to all subsequent proceedings in garnishment, and may take advantage of any defect in the pleadings of his adversary.
2. In a suit by attachment in the city court of Lexington, it is necessary to file a declaration in attachment at the term to which the suit is returnable, in like manner as if the suit were in the superior court. In the absence of such a declaration, any judgment rendered in the suit is a nullity, and may be attacked anywhere.

Argued April 14, — Decided June 14, 1905.

Certiorari. Before Judge Holden. Oglethorpe superior court. December 14, 1904.

Joel & Hawes Cloud, for plaintiff in error.

Hamilton McWhorter and *Hamilton McWhorter Jr.*, contra.

CANDLER, J. By the terms of the act approved December 13, 1899 (Acts 1899, p. 400, § 19), establishing the city court of Lexington, it was provided that "all laws upon subjects of attachments and garnishments as to any manner whatever in the superior courts of this State shall apply to the said city court as

if named with the superior court, so far as the nature of the city court will admit." Consequently, in a suit in attachment in that court, it is as necessary to file a declaration in attachment at the first term of the court as if the suit were brought in the superior court. In a proceeding on garnishment in attachment, where a claim to the fund sought to be reached is filed, and bond is given to dissolve the garnishment in accordance with the Civil Code, § 4720, the claimant becomes "a party to all further proceedings upon said garnishment." Civil Code, § 4723. As a party to the garnishment proceedings, whose interests are adverse to those of the plaintiff, he may, of course, take advantage of any defect in the pleadings. The failure of the plaintiff to file his declaration in attachment at the first term is a very serious defect, so serious, indeed, as to make it impossible to render any valid judgment in the case. The words of the statute are mandatory,—“the plaintiff *shall* file his declaration at the first term.” Civil Code, § 4556. As was said by Mr. Justice. Hall in *Banks v. Hunt*, 70 Ga. 743: “An attachment can no more proceed to judgment without a declaration filed on it at the term of the court to which it is returnable, than could an ordinary suit unless the declaration had been filed twenty days before the term to which the suit was made returnable.” See also *Jaffray v. Purtell*, 66 Ga. 226. Nor does it matter that the claimant failed to call the attention of the judge of the city court to the fact that there was no declaration in attachment. A judgment against the fund in which the claimant was interested, in the absence of such a declaration, was an absolute nullity, and he could attack it anywhere. It was error to overrule the certiorari.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

LOONEY v. MARTIN.

Prima facie the right to the custody of an infant is in the father; and where this is resisted upon the ground that the father has relinquished his parental rights by contract, a clear and strong case must be made, and the terms of the contract, to have the effect of depriving the father of his control, must be definite and certain. Such a case was not made on the trial in the city court, and the superior court did not err in sustaining the certiorari.

Submitted April 14,—Decided June 14, 1905.

Certiorari. Before Judge Russell. Franklin superior court. October 1, 1904.

This was a habeas-corpus proceeding for the possession of two minor children, Forest and Devery Martin, aged respectively seven and four years. It originated in the city court of Carnesville, and was brought by Looney, the maternal grandfather of the children, against their father. The judge of the city court awarded the children to the grandfather; whereupon the father took the case, by certiorari, to the superior court. The certiorari was sustained, and the case remanded for another hearing, and Looney brought the case to this court by bill of exceptions. The evidence for the plaintiff in the city court was substantially as follows: Martin's wife, who was the daughter of Looney, has been dead about three years. Since the death of their mother the two children, Forest and Devery Martin, have been staying at Looney's house. Their father has contributed only a small sum to their support. About September 1, 1902, Martin was at Looney's house, when Looney asked him if he was not going to give him the children, and Martin replied that Looney could keep them for his lifetime. Looney had frequently made the same request of Martin prior to this time, and Martin had always said that he would not give his children away. Looney is able to take care of the children. Some time during the fall of 1901, Looney and Martin had a conversation relative to Martin's marrying a second time, and Looney told Martin that he ought to marry some one that would be good to his first wife's children. Martin admitted that he intended to marry again, and said that he and the young lady had talked over the matter of the children; that he had told her that if she did not feel that she could take them all three and be a mother to the two children, they had better not marry; and that she had expressed a willingness to do as he wished. Looney then told Martin that he did not think he could do better than to marry. In April after the promise made by Martin that Looney should have the children for his lifetime, Martin came to Looney's house and took the children home with him. Subsequently Looney demanded possession of the children on the contract, and the demand was refused. The evidence for the defendant was substantially as follows: After the death of Martin's wife, all of his household

effects were moved to Looney's house, and the children went to live with the Looneys. Some time in August, 1902, Martin, with a friend, went to get his furniture from Looney. Looney asked him if he was not going to let him have the children. Martin replied that he would not; that the children could stay part of the time with him and part of the time with their grandparents, but that he would not give the children to anybody. Mrs. Looney, who was present, remarked that she would have a better understanding than that, and Martin replied that it was either that or nothing. The Looneys had frequently asked him to give them the children, and he had always refused, as he never had the remotest idea of giving them to anybody. About three or four weeks before the issuance of the writ of habeas corpus, Martin went to Looney's house and took the children home with him, Looney giving his consent at the time. When Looney afterwards came and tried to get the children again, he told him that the only way anybody could get them would be first to take his life.

J. B. Jones and W. A. Bailey, for plaintiff.

J. A. Neese and A. G. Golucke, for defendant.

CANDLER, J. (After stating the foregoing facts.) No question is made as to the fitness of either of the parties to the action to have charge of small children, or of their financial ability to take care of them. The only issue raised by the evidence is whether or not such a clear and definite contract of relinquishment was made by the father as to warrant the habeas-corpus court in awarding the minor children to the grandfather rather than to the father. This case, in its facts, bears a striking resemblance to the case of *Miller v. Wallace*, 76 Ga. 479. That case, like this, was a contest between the father and the maternal grandparents of a minor child. It appeared that the mother of the child, shortly before her death, expressed the wish that her mother and father should take, care for, and raise her child; and that the father of the child stated that as his wife wanted her mother to have the baby, she should do so. About a month after his wife's death, the father of the child stated that he wanted his mother-in-law to take the child and raise her as she had her own daughter, and make such a woman of her. The father subsequently,

by stratagem, gained possession of the child, and the grandparents brought habeas corpus. The trial court awarded the child to the grandparents, but on writ of error to this court the judgment was reversed. It was held: Prima facie the right of custody of an infant is in the father, and where this is resisted upon the ground of his unfitness for the trust, or other cause, a proper regard for the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs; and a clear and strong case must be made to sustain an objection to the father's right. Where it is insisted that the father has relinquished his right to the custody of his child to a third person by contract, the terms of the contract, to have the effect of depriving him of his control, should be clear, definite and certain." Tested by this rule, we think the judge of the superior court was justified in holding that the habeas-corpus judge had not made a proper use of the discretion vested in him. It is true that there was positive evidence that the father promised the grandfather that he should have the children during the latter's lifetime; but this evidence was as positively contradicted by witnesses for the defendant; and the circumstances were not such as to make out the clear, convincing case required by the ruling in *Miller v. Wallace*, supra, before the father could be deprived of the custody and control of his children. Looney and his wife had persistently urged Martin to give them the children, and he had stubbornly refused to listen to such a proposal. On all occasions, whenever the circumstances warranted, Martin had asserted his right to the possession of the children, and had stated that he would never give them to anybody. Apparently he had placed the children with the Looneys only temporarily, until he could make some arrangement of a permanent nature. During this time he had continued to contribute to their support. In contracting a second marriage he had made special provision for his children, and had it clearly understood that they were to have a home with him. All these circumstances throw a cloud over the statement of the witnesses that Martin agreed that Looney should have the children during his lifetime, and give the case a doubtful aspect. It is not the "clear and strong case" which the law requires as showing a relinquishment of the parental right. As was said in the case of *Lamar v. Harris*, 117 Ga. 997, "the

law does not fly in the face of nature, but rather seeks to act in harmony with it;" and therefore more than the usual proof is required to sustain a case based upon the contention that a father, fit and able to care for his offspring, has voluntarily relinquished his right to its custody and control. For these reasons we conclude that the court below properly sustained the certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

VESTEL v. TASKER, receiver.

CANDLER, J. 1. While, as a general rule, a receiver can not bring suit except by express authority of court (*Screven v. Clark*, 48 Ga. 42), this rule does not apply to a petition for injunction brought by the receiver in the court by which he was appointed. The fact that the court entertains his petition is tantamount to a grant of authority to sue.

2. "It is the duty of the court to protect from interference the property in its possession through its receiver, an officer of the court; and the writ of injunction is a mild remedy, when attachment and imprisonment for contempt might have been used by the chancellor." *Marshall v. Lockett*, 76 Ga. 290. The granting of an injunction to restrain any unauthorized interference with property in the possession of a receiver "is a necessary incident to the power of appointing receivers." *Woodburn v. Smith*, 96 Ga. 245. It follows that the demurrer to the petition was properly overruled.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued April 15, — Decided June 14, 1905.

Equitable petition. Before Judge Gober. Fannin superior court. January 26, 1905.

T. A. Brown, N. A. Morris, William Butt, and D. W. Blair,
for plaintiff in error. *J. Z. Foster and O. R. DuPre,* contra.

HALL v. WESTERN AND ATLANTIC RAILROAD CO.

The only duty which a railroad company owes to a trespasser on its right of way is to observe ordinary diligence to avoid injuring him after his presence thereon becomes known to the employees in charge of the train. Consequently, in a suit by a widow for the homicide of her husband, where it appeared, from the undisputed evidence, that the deceased was a trespasser; that he went upon the railroad track in an intoxicated condition; that shortly thereafter his dead body was found near the track, wounded

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in such a manner as to indicate that he had been struck by a passing train while lying down on or near the track; and that the employees of the defendant in charge of the train which was supposed to have struck him never at any time saw him on the track or right of way, and did not learn until a considerable time afterwards that he had been killed, it was not error to direct a verdict for the defendant.

Argued April 15, — Decided June 14, 1905.

Action for damages. Before Judge Fite. Whitfield superior court. October 14, 1904.

W. C. Martin and *Cantrell & Ramsaur*, for plaintiff.

Payne & Tye and *R. J. & J. McCamy*, for defendant.

CANDLER, J. There is no dispute as to the material facts brought out by the evidence. The plaintiff's husband, for whose homicide she sued, went upon the right of way of the defendant company in an intoxicated condition, and proceeded to walk along the track. This was between two and three o'clock in the afternoon. His condition was such as to attract the attention of persons who saw him from a distance. Some time afterwards his lifeless body was found by the side of the track. The skull was crushed, but there were no wounds on the body. There were no eye-witnesses to the occurrence, but apparently the unfortunate man had lain down on the side of the track and gone to sleep, when he was struck in the head by the pilot, or some other part of a passing engine, and killed. The place where the body was found was not at or near a public crossing. The track at that point was straight for a distance of from a quarter to a half mile in the direction from which the train approached that is supposed to have struck the deceased. The engineer and the fireman of that train testified that they knew nothing whatever of the occurrence until that night or the following morning, when they were informed of it by others. When they passed the place where the deceased was afterwards found, each was attending to his customary duties on the engine. It was the duty of the engineer to keep a lookout ahead all the time, and it was also the fireman's duty to look ahead when he was not firing the engine. The fireman could not say whether he was firing the engine at this point or not; but both he and the engineer were positive that a lookout was kept all the time by one or both, and that neither of them saw the deceased on or near the track. At

the conclusion of the evidence the judge directed a verdict for the defendant, and the plaintiff excepta.

We find no error in the direction of a verdict for the defendant. It is well settled that the only duty that a railroad company owes to a trespasser on its right of way is to observe ordinary care to avoid injuring him after his presence has become known to the employees of the train. *Atlanta R. Co. v. Leach*, 91 Ga. 419; *Atlanta R. Co. v. Gravitt*, 93 Ga. 369; *Hambright v. Western & Atlantic R. Co.*, 112 Ga. 36. In one important respect this case differs from that of *Parish v. Western & Atlantic R. Co.*, 102 Ga. 285, in which Mr. Presiding Justice Lumpkin and Mr. Justice Atkinson dissented from the majority opinion. In the *Parish* case a nonsuit was granted, and it was the opinion of the dissenting Justices that in the absence of any evidence as to the facts surrounding the death of the deceased, the presumption raised by the law upon proof that he was killed by the running and operation of the defendant's train was sufficient to carry to the jury the question of negligence. In the present case that presumption was fully met by the evidence for the defendant, which was not contradicted in the smallest material particular. As was said in the case of *Holland v. Sparks*, 92 Ga. 753, section 2321 of our present Civil Code "imposes the burden of proving the observance of such diligence as was due, not the burden of proving that none was due." The defendant company in this case even went to the extent of proving that no diligence was due; for it was clearly shown that neither the engineer nor fireman ever saw the plaintiff's husband on the track or right of way. The fact that the track was straight at this point for more than a quarter of a mile does not alter the principle involved; for the engineer and the fireman had no reason to expect the presence of a trespasser on the track, and relatively to him it was not negligence even if they failed to keep the usual lookout at this point. Besides, in view of the evidence as to the manner in which the deceased was struck by the passing train, it is quite conceivable that the engineer and the fireman may have been looking ahead in the full performance of their duties, and yet not have seen a man lying on or near the track. Certainly a lookout for such objects can not be exacted from railroad companies as the measure of diligence due to trespassers. A verdict for the

plaintiff would have been contrary to law, under the evidence in the record, and therefore it was not error to direct a contrary finding.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

RICHMOND HOSIERY MILLS v. WESTERN UNION TELEGRAPH COMPANY.

1. A judgment on demurrer, not excepted to, is conclusive between the parties as to the points necessarily decided.
2. The overruling of the demurrer which was filed in the case at bar was a conclusive determination that a right of action existed, but did not adjudge what was the measure of damages.
3. In *Brooke v. Western Union Telegraph Co.*, 119 Ga. 694, it was held that "In the transmission of a telegraphic message the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission."
4. If a telegram is sent containing a proposal to sell goods, but, by mistake of the telegraph company, as delivered it does not state the proposal correctly, the receiver can not recover from the telegraph company compensatory damages on the ground that if the message had been correctly transmitted, so as to contain the proposal as intended by the sender, it would have been accepted in that form and certain benefits or profits would have accrued to the receiver therefrom, it not appearing what actual loss, if any, resulted to the receiver from such error.
5. Under the facts of this case, a judgment by the presiding judge, to whom the case was submitted without a jury, in favor of the plaintiff against the defendant for nominal damages, was not erroneous.

Argued April 21, — Decided June 14, 1905.

Action for damages. Before Judge Henry. Walker superior court. September 2, 1904.

The Richmond Hosiery Mills, a corporation having its principal office at Rossville in this State, brought suit against the Western Union Telegraph Company, alleging in brief as follows: Plaintiff is engaged in the manufacture of cotton hosiery, and uses large quantities of cotton yarns and other fabrics. Finding it desirable to purchase a considerable amount of such yarns, plaintiff addressed a letter, on September 6, 1900, to Holland & Webb, a firm of commission merchants in New York City, requesting them to give to it a price on yarns. On September 10, they replied to this letter by telegram. As writ-

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ten and delivered to the company for transmission, the telegram read: "Your letter 6th. Sixteen and one half cents best our Eastern mill will take, same quantity as you refer to, delivery commencing in October. Let us hear from you at once. It is a low figure, and mill will not sell under present market for January delivery." This telegram was carelessly and incorrectly transmitted, so that when delivered to the plaintiff, instead of reading, "delivery commencing in October," it read, "delivery commencing in December." There were other minor changes, but none material. As soon as this telegram was received, and acting on it in good faith, plaintiff telegraphed to Holland & Webb to purchase of them one hundred thousand pounds of yarn for December delivery, accepting the offer in the words and figures of the message as received. But Holland & Webb declined to fill the order for December delivery. The difference between October and December was not essentially material to plaintiff, and if it had known that the real time of delivery as written in the original telegram was October, it would have ordered the yarn for that month, instead of for December. Plaintiff avers that Holland & Webb would have filled the order if it had been made for October, but that the time of delivery was material to them, and they would not accept an order for December. Before plaintiff discovered, by the exercise of due diligence and care, that errors had been made in the message, the price of cotton yarns of the kind ordered by it had materially advanced, whereby it lost a large sum of money, and by the failure to effect said purchase lost trade, and had to discharge a large number of its hands and curtail production. By reason of these facts, it alleged that it was damaged in the sum of \$2,000. The defendant demurred to the declaration, and the judge overruled all the grounds of the demurrer, except the fifth, which he sustained, and which was as follows: "The damages alleged to have been suffered by the plaintiff on account of loss of trade, discharge of hands, and curtailment of production are too remote to sustain a recovery." No bill of exceptions, pendente lite or otherwise, was filed to this ruling. Defendant admitted the sending of the telegram, and that, as delivered, it was not the same as when sent, but denied that it was guilty of any negligence in regard to

the matter. It denied that plaintiff telegraphed to Holland & Webb to purchase of them one hundred thousand pounds of yarn for December delivery; and alleged, that they were mere commission merchants, that they had no yarns on hand and none to sell, and whether they could buy the one hundred thousand pounds of yarn depended on the condition of the market at the time they received the telegram from the plaintiff in reply to their telegram. It denied that Holland & Webb were in a condition to fill the order if it had been made for October, and alleged that they depended on their ability to negotiate with some Eastern mill, and that whether or not such mill would have sold the yarn at the price quoted by Holland & Webb is a mere matter of opinion, and not a proper foundation on which to base a right of recovery. It denied that plaintiff had suffered any injury on account of the mistake in the telegram. Other allegations of the answer need not be set out. It is unnecessary to state the evidence in detail. The telegram referred to above was shown to have been sent by Holland & Webb, and the plaintiff sent the following reply: "Telegram received. Enter us for one hundred thousand pounds at 16-1/2, deliveries beginning in December. Please confirm your acceptance by wire. Clinch this for us." Holland & Webb replied by telegram as follows: "Your two telegrams received; mill will not accept your offer, but will accept one hundred thousand pounds, delivery in December, seventeen and a quarter cents." Plaintiff replied: "Can't raise our offer of yesterday; think mill should protect our offer of sixteen and a half; we accepted same immediately." It sent another telegram saying: "Can't raise our offer of yesterday. We accepted same immediately." And another later, saying: "We look to you for one hundred thousand pounds sixteen and a half; we accepted your offer made Sept. 10th; have written."

The vice-president and general manager of the plaintiff testified, that he first found out that there was an error in the telegram from Holland & Webb, dated September 10, about September 23, when he received a letter from them. When asked, "Did you make any effort to purchase this yarn, and what was the condition of the market after making this discovery?" he replied: "Everything was demoralized; it was the week of the Galveston flood, and the market rose on cotton three or four

cents a pound, and it was a very difficult matter to get an order placed at any price, and we didn't succeed immediately in placing an order. We placed an order subsequently for an inferior quality of yarn at two cents advance." He did not state how large an order the plaintiff placed at that advance, or how much actual loss accrued to it. He further stated, "The delivery was not material to me. I say I would have accepted the yarn for October delivery just the same as I would for December. I was the purchasing agent for the plaintiff." Evidence was also introduced, showing the price of yarns on September 16, 17, 18, 20, 22, to have been nineteen and three quarters cents per pound for October delivery; on October 12, twenty and a quarter cents per pound; that the highest price between September 10 and 22 was nineteen and three quarters cents per pound for October delivery, and the highest price between September 10 and October 12 was twenty and a quarter cents per pound; and that "the controlling price of yarns was around twenty cents during the above period of time." One of the firm of Holland & Webb testified that he sent the telegram involved in this litigation, and received an answer, the purport of which was that they should enter the plaintiff's order for a quantity of yarn, about a hundred thousand pounds, as per their telegram, but stating that it was for delivery in December instead of October, as they had written the telegram. If plaintiff had accepted the offer for yarn to be delivered in October instead of December, Holland & Webb would have filled it. They refused to do so solely on the ground of being unable to meet the conditions of delivery, the difference being that they could deliver in October, and could not deliver in December. Holland & Webb were commission brokers, and sold the output of the mill. They did not control the mill, nor its entire output. On September 18, Holland & Webb sent a telegram saying: "Telegram received. Have done nothing. You wanted December delivery, and mill would not accept." On September 10, they did not have one hundred thousand pounds of yarn of the quality and character described in the telegram. In fact they did not have any of it on hand. They contemplated placing the order with a mill, as a commission transaction.

The case having been submitted to the judge without a jury,

he found in favor of the plaintiff against the defendant \$1 as nominal damages, and costs of suit. The assignment of error was in the following language: "To the amount of which judgment this plaintiff excepted, and now assigns the same as error, and alleges the same should have been \$2,000.00, and that the proof authorized and demanded said sum of \$2,000.00 in damages."

Smith & Carswell and *R. M. W. Glenn*, for plaintiff.

Brown & Spurlock, *McHenry & Maddox*, and *G. H. Fearons*, for defendant.

LUMPKIN, J. (After stating the facts.) The sole question in this case is, what amount of damages was the plaintiff entitled to recover? The transaction between the plaintiff and Holland & Webb may be considered in two possible views: First, that the plaintiff had a binding contract with that firm; and second, that it did not. If Holland & Webb made a proposition by telegram to sell yarn and deliver it at a certain time, and by mistake in transmission a different time was stated in the telegram as delivered, and, acting on it as thus delivered, the plaintiff accepted the proposition, according to the ruling in *Brooke v. Western Union Telegraph Co.*, 119 Ga. 694 (citing *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576), this constituted a valid, binding contract between the plaintiff and Holland & Webb, and the plaintiff would be entitled to recover nothing from the telegraph company on account of the error. In that case it was held that "in the transmission of a telegraphic message the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission." Whether this ruling is in accord with the decisions in other jurisdictions or not, it is the law of this State while it stands unreversed. The demurrer of the defendant, however, was overruled, and no exception was taken thereto. Hence whether this judgment was correct or erroneous, until excepted to and reversed it was binding on the parties. *Kelly v. Strouse*, 116 Ga. 874 (7). It was an adjudication that the plaintiff was entitled to recover something of the defendant, if it sustained the allegations of its declaration by proof. An examination of the grounds of the demurrer,

however, will show that, with the exception of the fifth ground, they all went to the general question of whether the plaintiff was entitled to recover anything of the defendant or not. The fourth ground does say, in general terms, that there are not facts alleged sufficient to entitle plaintiff to recover the damages sued for, or to maintain this action. But this is really a general demurrer. The fifth ground attacked certain elements of damage claimed, as being too remote to sustain a recovery, and the judge so held. The result of the ruling on the demurrer therefore was to determine that, on the face of the declaration, the plaintiff was entitled to recover something. But it adjudicated nothing as to the amount of such recovery, or the measure of damages. If, therefore, we treat the telegram as constituting a valid contract between the plaintiff and Holland & Webb, the question remaining for adjudication may be thus stated in the form of a paradox: If a plaintiff in law is entitled to recover nothing, but the defendant, by reason of failing to except to a ruling on a demurrer, is estopped from saying so, what is the legal measure of recovery? The judge of the superior court, who made the ruling on the demurrer, and who also heard the case without a jury, both upon the law and facts, decided that nominal damages furnished the most appropriate answer to the question above propounded; and we can not say that he erred.

So far as the plaintiff seeks to rely upon estoppel by judgment, it may perhaps have cause for regret that the defendant did not go further and specifically attack the measure of damages set up, and thus entangle itself in the web of estoppel, both as to right of action and amount of recovery. Such appears to have been the case in *Georgia Northern Ry. Co. v. Hutchins*, 119 Ga. 504. There the defendant raised by its demurrer, not only the question of the right to recover, but also the question as to whether the damages claimed by the plaintiff were of such a character as to be recoverable. The demurrer, attacked not only the whole petition, but also the different paragraphs on the subject of damages. After it had been overruled the defendant failed to except to the ruling, and thus went to trial facing a species of compound estoppel, both as to right of action and as to measure of damages. But what in real substance did the transaction between the plaintiff and Holland & Webb amount to? That firm

were commission brokers in the city of New York. They did not have yarns of their own, but placed orders with mills. Looking at all the communications between the two it seems, at least, doubtful whether the plaintiff thought that it was contracting with Holland & Webb on their individual responsibility. Its telegram of acceptance says: "Enter us for one hundred thousand pounds. . . Clinch this for us." In another telegram plaintiff says: "Think mill should protect our offer." If the matter of an anticipated dealing by Holland & Webb with a third party be left out of view, however, and the transaction be considered solely as between that firm and the plaintiff, how does it stand? The plaintiff does not pursue Holland & Webb or seek to hold them on the ground that it had a binding contract with them. It proceeds against the telegraph company on the ground that it lost the benefit of making a contract with that firm by reason of the mistake. Looked at in this light, it would seem that Holland & Webb gave to the telegraph company for transmission a telegram offering certain yarn for October delivery; that by error in transmission the telegram as delivered offered the yarn for December delivery. The plaintiff telegraphed its willingness to accept the shipments for December delivery. These telegrams, therefore, either made a complete contract, or an offer on one side which was not accepted as it was made by the other. The offer was for October delivery; the acceptance was for December delivery. Thus viewed, the plaintiff's complaint, is, that, by reason of the defendant's negligence, an offer or proposal to sell on certain terms was not properly brought to it. While there is some conflict in the authorities, the more satisfactory line holds that, "compensatory damages can not be recovered of a telegraph company for failure to send or deliver a mere proposal to sell, . . . as they are contingent upon its acceptance." *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, and authorities there cited. Compensatory damages, as here used, mean such as measure actual loss, and not mere nominal damages or the cost of transmission. On page 414 of the authority just cited Brannon, J., used the following language: "But the trouble facing the plaintiff in this case is that there was no finished contract between the parties, but only a proposal for a contract; and there can be no contract without both a proposal and its ac-

ceptance. The failure of the telegraph company did not cause the breach of a consummate contract. It only prevented one that might or might not have been made. . . To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated as a witness that his firm would have accepted that proposal, if it had been received. This will not prove the fact. That evidence does not make the fact certain. The opinion of this witness months afterwards can not go to that length." P. 418. See also *Smith v. Western Union Tel. Co.*, 83 Ky. 104; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Johnson v. Western Union Tel. Co.*, 79 Miss. 58; *Clay v. Western Union Tel. Co.*, 81 Ga. 285; *Western Union Tel. Co. v. Watson*, 94 Ga. 202. Mr. Justice Simmons in delivering the opinion in the last-cited case said: "This action is based on the theory that if the telegram had not been shown Pitner, Watson would have made a different arrangement with him, that he would have induced Pitner to consent to use another gin until the gins he was expecting to receive should arrive, and thus get his commission on the sale of those gins. In order to do this, it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true Pitner says now that he would have made it; but we can not tell whether he would have done so or not; he might have been in a different state of mind then from the state of mind he was in at the trial of the case." So in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice-president, thinks now that it would have accepted the offer, but it is exceedingly speculative, as a basis for damages, to say that if an offer had been received the plaintiff would have accepted it, and would have derived certain advantages from it.

While there is some evidence that the plaintiff placed an order at an advanced price, there is none as to how large an order was so placed, or how much the actual loss of the plaintiff was. The decision in *Hollis v. Western Union Telegraph Co.*, 91 Ga. 801, is in harmony with those just cited, making the

recovery depend upon the actual loss. See also *U. S. Telegraph Co. v. Wenger*, 55 Penn. St. 262.

Several of the authorities cited by the plaintiff in error were cases brought by the senders of telegrams. In some of the other cases there was a failure to correctly transmit or promptly deliver a message which would have closed a contract, the direct result of which failure was to cause a loss. The latter class of cases is well illustrated by *Western Union Telegraph Co. v. Fatman*, 73 Ga. 285, and *Dodd Grocery Co. v. Postal Telegraph Cable Co.*, 112 Ga. 685.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

GRAVES v. RIVERS,

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1. A petition which alleges the ability of the parties to contract marriage, the mutual promises to marry and their terms, and the defendant's breach sufficiently states a cause of action for breach of promise of marriage.
2. Seduction of the plaintiff by the defendant subsequently to the promise to marry and pending the engagement may be alleged and proved in aggravation of the damages.
3. The damages recoverable in this form of action may include full compensation for the pain, mortification, and wounded feelings of the plaintiff, and in these matters the amount of recovery must be left to the enlightened conscience of impartial jurors.
4. Neither party to an action for breach of promise of marriage is a competent witness.
5. A charge to the effect that the plaintiff may recover on proof of the contract of marriage and its breach by the defendant is open to the criticism that it excludes the defense of a justifiable refusal to consummate the promise to marry.

Argued May 18, — Decided June 14, 1905.

Action for damages. Before Judge Hollingsworth. City court of Fayetteville. October 29, 1904.

Sallie Rivers sued out an attachment against J. M. Graves, on the grounds, that the defendant "absconds, also that he conceals himself, and also that he is about to remove beyond the limits of the county." The attachment was sued out before the judge of the city court of Fayetteville, and made returnable to the October term, 1903, of that court. The attachment was levied upon certain property of the defendant. Before the re-

turn term the plaintiff filed her declaration in attachment, alleging as follows: 1st: That the petitioner had endamaged her in the sum of \$10,000. 2: That the defendant began visiting petitioner about six years ago, petitioner then being a young lady about eighteen years of age, and the defendant being a young man about twenty years old; that the defendant continued to visit her from that time "constantly" until about July 15, 1903 "coming to see petitioner quite often, once or twice each month." 3d: that the defendant professed to love her, and by his constant visits and attentions and professions of love he led her to believe him and to love and admire him, and as a result of such courtship they were engaged to be married, which engagement continued until the summer of 1901, when, on account of some trouble that it was alleged the defendant was in, petitioner's father and mother objected to the visits of the defendant, and the engagement was broken; that defendant did not visit petitioner for several months, but after the lapse of this time the defendant, "to ingratiate himself again into the affections of petitioner and her people," protested his innocence of the charges and rumors that had been made against him, and obtained once more the good will of petitioner's parents and of herself; as a result of which they were again engaged to be married, which engagement has never been broken off by petitioner." 4th: that the defendant and petitioner were to have been married "last Christmas, both having agreed to said time," but for some reason the defendant had put the time off for some months, claiming not to be ready, and when the time arrived again he made other excuses, and finally quit visiting petitioner at all, "and has broken his solemn engagement with petitioner." 5th: that during the continuance of the engagement, the defendant all the time promising to marry petitioner, he, by persuasions and manifestations of love and affection for her, and by other false and fraudulent means, induced her to have intercourse with him "during the fall and winter of last year and at Christmas, and again in January of this year," as a result of which petitioner became pregnant and gave birth to a child on September 11, 1903, which child is now living and is the child of the defendant. 6th: that up to the time she was seduced by the defendant petitioner had lived a moral and virtuous life, had a happy

and good home, and moved in the best society; but through the baseness of defendant's conduct her happiness in life has been blighted and ruined, her social standing and bright prospects have been totally destroyed, and henceforth she will be a social outcast because of the illegal and fraudulent representations of the defendant. 7th: that she had implicit faith and confidence in the defendant and believed that he was sincere; that she loved him and acted in perfect good faith; but that all the promises and representations made by the defendant to her were false and fraudulent, and made to deceive her and to destroy her chastity and happiness, and that although she has tried to get him to right the wrong done her, he fails and refuses so to do. (The 8th paragraph was stricken on demurrer.) 9th: that as a result of the intercourse of the defendant with her she has become unwell and sick in bed a good deal of the time since January "of this year;" that about one month before the birth of her child she had to take her bed, and has since, and will be for some time to come, suffering great pain and agony, both in body and in mind; that she now has the child to look after and support without the assistance of the defendant; that she will continue to suffer in body, and especially in mind, all the remainder of her natural life, all on account of the unconscionable conduct of the defendant. 10th: that on September 18, 1903, she sued out before W. B. Hollingsworth, judge of the city court of Fayetteville, an attachment against the defendant, returnable to the October term, 1903, of that court, which attachment was levied by the sheriff of Fayette county on property therein described. The 11th paragraph contains a prayer for a judgment of \$10,000, and a special judgment against the property upon which the attachment was levied, and "that she have a general judgment." There was an entry of service of this declaration by leaving a copy at the defendant's most notorious place of abode.

At the October term, 1903, of the city court of Fayetteville, the case was called for trial; and the defendant moved to dismiss the suit, first, because no cause of action was set forth, and secondly, because the petition showed on its face that it was an action for seduction and that the plaintiff had no right to sue for her own seduction. The court overruled the motion to dismiss; whereupon the plaintiff offered to amend the petition by

adding, after the word "facts" in the first line of paragraph 11, the following: "and the breach of said contract for marriage, for which petitioner sues." Upon the allowance of this amendment the defendant demurred generally, that there was no cause of action set out in the petition; and that the action was barred by the statute of limitations; and demurred specially to all the allegations as to seduction, because such allegations were irrelevant and the seduction was not alleged as being subsequent to the promise of marriage; that the damages alleged in the 9th paragraph were not recoverable; that the attachment affidavit and bond were insufficient in law, and because the court issuing the attachment was without authority to do so. He demurred also to the eighth paragraph. The court overruled the demurrers, both general and special, except to the 8th paragraph, and as to this paragraph the demurrer was sustained. The trial resulted in a verdict for the plaintiff in the sum of \$10,000. The defendant made a motion for a new trial, which was overruled, and he excepted to the judgment overruling the motion to dismiss and the demurrers, and the refusal of a new trial.

A. O. Blalock and J. F. Golightly, for plaintiff in error.

J. W. Wise, contra.

EVANS, J. (After stating the facts.) 1-3. An action to recover damages for a breach of promise to marry is predicated on the contract and its breach. All that is necessary to be alleged in the petition is the promises to marry and their terms, and the defendant's breach. Where special damages are not claimed, these averments comprise all the issuable facts. 5 Cyc. 1007. The facts related in the petition begin with a courtship six years before the bringing of the suit, and the narrative proceeds with a description of the first engagement, how and why it was broken off, when it was renewed, the time the marriage was to be consummated, the wiles of the defendant to secure postponement of the nuptials, and his refusal to marry the plaintiff. Many of the averments in the petition might be treated as surplusage, but the essential elements of the form of action are alleged. The mutual promises to marry, the final agreement that the marriage contract was to have been on Christmas preceding the filing of the suit, the readiness of the plaintiff to marry at that time, the refusal of the defendant to comply with

his contract, and his final abandonment of his attentions are alleged with sufficient definiteness to set out a cause of action. Defendant demurred to the petition, on the ground that the cause of action was barred by the statute of limitations. It is not pointed out what limitation period is applicable. As the suit sounds in contract and is brought within a year from the alleged breach of the contract, we can not perceive how the plaintiff can be barred. The special demurrers to the paragraphs of the petition which allege seduction as an aggravating element of damages are without merit. The seduction is alleged to have been subsequent to the promise to marry and pending the engagement to marry. The seduction of the plaintiff under promise of marriage may be alleged and proved in aggravation of damages. 3 Enc. Pl. & Pr. 688, and cases cited. Although the form of action is *ex contractu*, yet the measure of damages, in a case where the plaintiff is entitled to recover, may include full compensation for the pain, mortification, and wounded feelings suffered by her in consequence of the dishonorable conduct of the defendant; and the amount of the recovery must be left to the enlightened conscience of impartial jurors. *Parker v. Forehand*, 99 Ga. 743. One of the special demurrers challenged the sufficiency of the attachment affidavit and bond and the authority of the court to issue the attachment. The demurrer did not specify any particular defect, and as the grounds of the affidavit were statutory and sufficiently alleged (*Kenyon v. Evans*, 36 Ga. 89), and both affidavit and bond were prepared after the code forms (Civil Code, § 4529), we can not see any irregularity in either. The affidavit for attachment was made before the judge of the city court of Fayetteville, and the writ of attachment was issued by him. The attachment was returnable to the city court of Fayetteville, and the judge thereof had jurisdiction to issue it. (Acts 1902, p. 126.) Hence we conclude that the court did not err in overruling all demurrers except the special demurrer to the eighth paragraph, which was sustained.

4. Six grounds of the amended motion for a new trial complain in various ways that the plaintiff was permitted to testify over the defendant's objection. The plaintiff was an incompetent witness, and the court erred in holding that she was competent. At common law a party to a suit, interested in the result

of the trial, was disqualified from testifying, because of his interest. The evidence act of 1866 permitted certain persons to testify notwithstanding their interest, but in express terms the ban of disqualification was left on parties to an action for breach of promise of marriage. Civil Code, § 5272. The evidence act of 1889 (Civil Code, § 5269) superseded only one clause of the act of 1866, but there is nothing in that act which removes the incompetency of those persons disqualified by the other clauses of the act of 1866. Section 5272 explicitly and positively declares that nothing contained in section 5269 shall apply to any action for breach of promise of marriage. While in England and in many of the States the common-law rule of exclusion in this class of cases has been relaxed so as to allow the parties to testify, with the qualification that their testimony must be corroborated, in this State a party is absolutely excluded as a witness.

Where the party is denied the right to testify, resort is usually had to circumstantial evidence to prove or disprove the complaint. Since commonly marriage proposals and their acceptance do not transpire in public or in writing, they must be established by the observed conduct of the parties or their admissions. "When marriageable persons conduct toward each other as engaged persons commonly do, and as those who are not engaged do not, the reasonable and fair inference is that they are in fact what they thus hold themselves out to be, engaged: and in a breach of promise suit the jury is justifiable in so finding." Bish. Mar. & Div. § 197. Likewise any other material issue in the case may be supported by proof of various circumstances which point to the existence of the fact sought to be established.

5. Exception is taken to the following charge of the court: "I charge you that if you believe from the evidence that J. M. Graves, the defendant, did contract marriage with the plaintiff, then the breach thereof would make the defendant liable, that is if he failed to carry out this contract." This charge is open to the objection that under it the plaintiff would be entitled to recover for any breach of the contract, although the defendant may have been legally justifiable in refusing to carry out his promise to marry; and the exception is well taken.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

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PHINAZEE, administrator, v. BUNN.

1. The evidence, taken in that light which was most favorable to the plaintiff, authorized a finding that, under all the circumstances proved, and considering the character of the services rendered by the adult daughter to her father during his last illness, she was not prompted solely by the natural duty owing by her to him, but that both parties contemplated that she should be compensated out of his estate after his death; and the judgment refusing a second new trial will not be interfered with.
2. The interrogatories were not leading; but so treating them, there was no abuse of discretion in allowing the answers to be read.

Argued May 17, — Decided June 14, 1905.

Complaint. Before Judge Clark. City court of Forsyth. October 28, 1904.

This was an action by an adult daughter against the administrator of her father's estate, to recover for services rendered her father in nursing and caring for him during his last illness, and in doing other work on his farm and in his house. There was a verdict for the plaintiff, and a new trial was granted. The next trial also resulted in a verdict for the plaintiff, and the defendant made a motion for a new trial on the grounds, that the verdict was without evidence to support it, and that the court allowed answers to certain interrogatories to be read, over an objection that the questions were leading. The motion was overruled, and the defendant excepted.

Persons & Persons, for plaintiff in error.

J. R. Williams and *Wightman Bowden*, contra.

COBB, J. 1. Children being under a moral duty to nurse and care for their infirm parents, a promise to pay is not implied from the mere fact of service, as in case of strangers. But the performance of such service is a sufficient consideration for an express promise to pay. *Hudson v. Hudson*, 87 Ga. 678; *Butler v. Billups*, 101 Ga. 102; *Weaver v. Cosby*, 109 Ga. 310, 316. While a contract to pay will not be implied from the mere performance of the services, there are cases where the law will imply a contract by a parent to pay a child for services of the character above referred to. In *Murrell v. Studstill*, 104 Ga. 606, Mr. Justice Lewis said: "This court has never decided that on account of relationship, however near, there can be no recovery for services rendered by one relative to another with-

out proof of an express contract." In *Hudson v. Hudson*, 90 Ga. 581, it was held that a recovery may be had if an express contract be shown, or if the "surrounding circumstances . . . indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely because of that natural sense of duty, love and affection arising out of this relation." This ruling was reaffirmed in *O'Kelley v. Faulkner*, 92 Ga. 522, though in that case the evidence was not sufficient to show that payment for the services was in the contemplation of both parties. See also *Weaver v. Cosby*, 109 Ga. 316; *Walker v. Brown*, 104 Ga. 361. In the cases of *Murrell v. Studstill*, 104 Ga. 604, and *Hurst v. Lane*, 105 Ga. 506, no express contract was shown, and it was held that the circumstances were such as to show that the parties contemplated that the plaintiffs (one a grandchild and the other a niece) should receive compensation for their services.

We hardly think the evidence in this case is sufficient to show an express contract. While some of the witnesses did say there was a contract between the plaintiff and her father, taking their testimony as a whole no express contract was shown. There was evidence that the plaintiff was thirty-five or forty years of age; that she nursed and cared for her father for a long period of time while he was stricken with paralysis, that she also hoed and plowed in the field for him during this time; that the father stated several times that he had given the plaintiff the "home place, or the money it would bring," for waiting on him; that he had stated this in the presence of the plaintiff; that he frequently said the plaintiff must have pay, as she had earned it, and the plaintiff would make no response to the statement; that the father was taken sick in the fall of 1897, but made the statement in the spring of 1898 about wanting the plaintiff to have pay, and that he died about February, 1899; that the services performed by the plaintiff were worth \$30 per month, and extended over a period of seventeen months. We think the jury could find, from the evidence, that, considering all the circumstances, both the father and the daughter contemplated she should receive compensation for the services rendered; especially so in view of the character of the services rendered. See *Murrell v. Studstill*, supra. The judgment refusing to grant a second new trial will not be interfered with. Civil Code, § 4936.

2. An examination of the interrogatories objected to shows that they were not leading. They did not suggest the answer expected. *Franks v. Gress Lumber Co.*, 111 Ga. 87. Besides, the allowance of leading questions is a matter within the discretion of the trial judge (*Ga. R. Co. v. Churchill*, 113 Ga. 14, and cit.), and his judgment will be reversed only where it is apparent that injustice has been done. *City of Rome v. Stewart*, 116 Ga. 738 (2), 740. Greater liberality should be allowed as to the form of interrogatories than in the case of ordinary questions to a witness when on the stand. *Ewing v. Moses*, 51 Ga. 419.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

RIGGINS, trustee, v. BOYD MANUFACTURING CO.

The trial court committed no error requiring a reversal of the judgment below, in ruling out the evidence introduced by the defendant.

Submitted May 17, — Decided June 14, 1905.

Complaint. Before Judge Russell. Pike superior court. October 6, 1904.

Joseph D. Boyd Manufacturing Company sued A. D. Riggins, as trustee for his wife, M. S. Riggins, on a promissory note, for \$210.87 principal, which he as her trustee had executed to it, dated February 25, 1901, and due October 15 after date. The petition alleged, that the consideration of the note was fertilizers furnished by the plaintiff to the defendant as trustee, which were used by him as such, on certain lands belonging to the trust estate, and that they were articles of necessity for which the trust estate was liable. A copy of the deed creating the trust and describing the lands of the estate was attached to the petition, as well as a copy of an order of the judge of the superior court appointing the defendant trustee in lieu of a former trustee. The petition asked for a special judgment against the lands of the trust estate described therein. The defendant in his answer admitted that he was trustee as alleged, and pleaded payment. The plea alleged, that the defendant, as trustee, in the year 1900, bought of the plaintiff designated quantities and kinds of fertilizers of the aggregate value of \$367.75;

that in the fall of the same year he paid the plaintiff a stated quantity of lint cotton of the value of \$462, which overpaid the amount of his indebtedness to the plaintiff \$94.25. On the trial the plaintiff put in evidence the note sued on, and introduced a witness who testified that the consideration of this note was fertilizers bought by the defendant as trustee for M. S. Riggins, and that the trust estate got the benefit of such fertilizers by reason of their use upon the lands of the estate. The plaintiff introduced also a trust deed dated April 13, 1857, whereby a trust in certain lands, negroes, etc., was created for the benefit of Mary Susan Neal, now Mrs. M. S. Riggins. The defendant put in evidence a note signed by him as trustee for M. S. Riggins, payable to the plaintiff, for \$670.50, dated May 29, 1900, and due October 15 after date, the consideration of which was thirteen tons and eight sacks of guano and five sacks of acid, with credits thereon of 4,362 pounds of lint cotton. The defendant testified: "That the note sued on was a renewal note for the balance of the \$670.50 note given May 29, 1900; that he bought a part of the guano for the trust estate, and a part of it he bought for sale, and did sell a part of it, and used a part of it on the trust estate; that he signed the note as trustee because they asked him to do that; that at the time the guano was bought nothing was said about his buying it as trustee, but he did use on the trust estate ten tons and eight sacks of the guano; and that he used the seven and one half tons of acid; that the market value of the guano at the time he bought it was \$20 per ton, and the market value of the acid at the time he bought it was \$17.50 per ton, the total amounting in the aggregate to \$347.25; that he as trustee paid, from the crops of the trust estate, upon the guano debt the amount of four thousand, three hundred and sixty-two pounds of middling lint cotton, as appeared from the credits upon the note introduced in evidence, dated May 29, 1900, for the sum of \$670.50; that the trust estate had not bought or in any way received anything else from the plaintiff, nor [did] he or the trust estate owe the plaintiff anything else, . . . that his wife, M. S. Riggins, had then living eight children; that the cotton he had delivered to plaintiff from the trust estate was worth, at the time he made the delivery, 9-1/2 cents per pound, and making the aggregate

amount thus paid \$414.39, which more than paid off all that the trust estate actually owed the plaintiff upon said note." On motion of the plaintiff, the court ruled out the note put in evidence by the defendant and all of the defendant's testimony, except that Mrs. Riggins had eight children then living. The court then directed a verdict for the plaintiff. The only error assigned is the ruling out of the evidence offered by the defendant as above set forth.

G. D. Dominick and E. C. Armistead, for plaintiff in error.

E. F. DuPree, contra.

FISH, P. J. The trust involved in this case was construed in *Riggins v. Adair*, 105 Ga. 727, where it was held that the trust created is executory, at least during the lifetime of Mrs. Riggins, and that the property of the trust estate is liable for debts created by the trustee for the benefit of such estate. In that case the trust estate was held to be bound for a debt contracted for fertilizers bought for its use. The evidence for the plaintiff, in the present case, made out a clear case of liability on the part of the trust estate for the amount represented by the note sued on, and, unanswered, demanded a verdict in favor of the plaintiff for the full amount. The defendant sought to meet this by evidence which the court ruled out, and the sole question which we are to decide is whether the court committed a reversible error in ruling out this evidence; for there is no exception to the direction of a verdict by the court or to the particular verdict which was directed. Whether the court was right or wrong in the ruling complained of is, in the view which we take of the case, immaterial. If this evidence had remained in, the jury could not have lawfully found in favor of the defendant generally, nor reduced the amount of the plaintiff's proved claim. From the evidence in question it appeared "that the note sued upon was a renewal note for the balance of the \$670.50 note given May 29, 1900." This last-mentioned note showed that it was given by the defendant as trustee, which fact he neither denied in his answer nor by his testimony. He did testify that at the time he bought the fertilizers for which this note was given, nothing was said about his buying them as trustee. But, on the other hand, he failed to state that anything was said about his buying them,

or any part of them, individually. How then did he buy them? Presumably, from the way he signed the note, he purchased them as trustee. He testified that he signed the original note as trustee, because "they" asked him to do that, a request which was both natural and proper if he bought the fertilizers for the trust estate, and which when made, in the absence of anything to the contrary, put him upon notice that the intention of the seller was to sell the goods to him in his capacity as trustee. He said nothing to the seller to indicate that he was not purchasing all of the fertilizers for the trust estate, and when he was asked to sign the note as trustee he did so without explanation or objection. If he did not intend to contract in his capacity as trustee for the whole of the fertilizers which he purchased, the time for him to have made this known was when he was asked to do so. As we have already intimated, when he bought the fertilizers for the purchase-price of which the original note was given, and signed such note in his capacity as trustee, the presumption was that he purchased the goods in his representative and not in his individual capacity. This presumption was not overcome by the mere statement "that at the time the guano was bought nothing was said about his buying it as trustee." When he signed the note in his representative capacity, something was said, or rather declared, in writing, as to the capacity in which he purchased the fertilizers. His statement that he did this because the seller asked him to do it is perfectly consistent with the idea that he bought the whole of the goods as trustee, while the manner in which he signed the note is inconsistent with the idea that he did not so purchase them all. He gave no explanation whatever as to why he signed the renewal note as trustee, after having, as he testified, paid all that the estate owed for the fertilizers. He testified "that he bought a part of the guano for the trust estate, and part of it he bought for sale," but he did not testify that this was understood between him and the seller, or that the latter knew that such was the fact; and he failed to state what part he bought for the trust estate, or how much he purchased for himself, nor did he state what the contract price of the guano or the contract price of the acid was. How, then, was it possible for a jury to find, either wholly or partially, in favor of his plea? Granting that it was permissible for him, after signing

both the original and the renewal note as trustee, to show that, at the time of the purchase, his undisclosed intention was to buy a part of the goods for the trust estate and a part for himself individually, it was still incumbent upon him, in order to overcome, either in whole or in part, the case made by the evidence for the plaintiff, to show what he bought for the trust estate and what he purchased for himself, and what the contract price was. This he utterly failed to do. He did testify that he used ten tons and eight sacks of the guano on the trust estate and used the seven and one half tons of acid, and sold three tons of the guano, but this did not show that the three tons of guano which he sold were not bought for the trust estate, and the seller was not bound to follow him up and see that he used all the fertilizers for the trust estate. Even if he had shown what part of the fertilizers he purchased for the trust estate and what part he bought for himself, there was no way of fixing the amount to be deducted from the plaintiff's proved claim against him as trustee, for the reason that he failed to show what the contract price of the guano or the contract price of the acid was.

The testimony in reference to the market value of the fertilizers and the market value of the cotton paid on the original note was wholly irrelevant and immaterial. The plaintiff was not suing upon a quantum meruit, but for a balance due under a contract of sale, and the price of the fertilizers was fixed by the contract between the parties, and could not be altered by proof of their market value at the time of purchase. This would be true even if the sale had been for cash, to which market value presumably refers; whereas the sale in question was upon a credit. The defendant could not go behind the renewal note for the purpose of showing the market value of the cotton which he as trustee had delivered to the plaintiff in part payment of the original note. For clearly the aggregate amount paid in cotton on the old note must have been agreed upon by the parties when the new note was given for the balance due. The giving of the renewal note was a distinct and clear recognition of the amount still due after the cotton payments had been made on the old note, and, in the absence of any proof as to fraud, accident, or mistake in the settlement evidenced by this note, no evidence as to the value of the cotton paid on the old note was relevant. As

the evidence for the plaintiff demanded a verdict in its favor for the full amount of the note sued on, and the evidence offered by the defendant would not have authorized the jury to find any other verdict, the court committed no error requiring a reversal of the judgment below, in the ruling complained of.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

STEELE v. CENTRAL OF GEORGIA RAILWAY COMPANY.

- LUMPKIN, J. 1. "The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him, when it is self-contradictory, vague, or equivocal." And unless there be other evidence tending to establish his right to recover, he "is not entitled to a finding in his favor, if that version of his testimony the most unfavorable to him shows that the verdict should be against him." *Southern Ry. Co. v. Hobbs*, 121 Ga. 428.
2. Under the plaintiff's testimony and other evidence introduced by him in this case, he was not entitled to recover for an injury received while attempting to pass under a bridge over a highway, driving a wagon loaded with cotton; and a nonsuit was proper. *Barfield v. Southern Ry. Co.*, 118 Ga. 256; *W. & A. R. Co. v. Ferguson*, 113 Ga. 712, and citations; *Bridger v. Gresham*, 111 Ga. 814; *City of Columbus v. Griggs*, 113 Ga. 597; *Ray v. Green*, 113 Ga. 920; *Farmer v. Davenport*, 118 Ga. 289.
3. This case does not fall within the ruling in *Samples v. Atlanta*, 95 Ga. 110.
4. Whether or not there was error in respect to permitting a question to be asked of a witness for the plaintiff on cross-examination, the ruling will not cause a reversal where the exclusion of the evidence can not affect the decision in regard to the grant of a nonsuit.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 17, — Decided June 14, 1905.

Action for damages. Before Judge Hammond. City court of Griffin. December 5, 1904.

Steele sued the Central of Georgia Railway Company, alleging that he had received an injury while endeavoring to pass under a bridge of that company, extending over a public highway in the city of Griffin. According to his testimony, he went to Griffin driving a wagon loaded with cotton, two bales being placed on the wagon and a third on top of them, he being seated on the top bale. He intended to cross the railway track at a certain street-crossing, but found it blocked by a train, and went further up the railroad. There were several streets at which

he could have crossed on a level with the track, but they were somewhat more distant. Nearer was a street which passed under the railroad track, and he determined to utilize it. He went along a street which was parallel with the railroad track, and then, at a point about one hundred yards distant from it turned into the street which passed under it. The place where he turned toward the railroad was on a somewhat higher grade than the track. He testified: "Where I started to go under the railroad track it was not more than thirty feet from the railroad. When I turned to go under the bridge I was sitting on the top bale, on the edge of it, with my feet on the bottom bale. When I started down the little hill and got half way down, I saw the danger and slid down on the bottom bale below, and was pushing back with my left hand on the cotton, and had the reins in my right hand, trying to stop the mules. My hand was caught between the beam of the bridge and the cotton. I had the reins in my right hand. In coming down that little hill I threw my hand up on the bale of cotton. When I got my hand up on the cotton I was not more than twenty feet from the railroad track, half way down the little hill. I got down off of the top bale of cotton to get out of the way of the timbers of the bridge. I saw I was not going under, and tried to stop the mules. I did not stop them soon enough. When I got under the railroad track it knocked me off. My hand got caught between the beams of the trestle and the cotton." He was a contractor, had built bridges, and had lived in the neighborhood of Griffin for fifteen years. In his testimony also occurred the following statements: "During that time Griffin has been my market. I am familiar with the streets of Griffin. . . . There is a street right up there that crosses the railroad track on a grade. . . . The tunnel route was the nearest, nearer than the crossing above here by some one hundred or two hundred yards. I had only been under that subway one time. I walked under it several years ago when it was first built, but I did not pay any attention to the height of it. I have rode by the bridge several times, I don't know how many times. I had not passed through there any other time. I come Second street. I had seen the bridge and knew it was there. . . . I had seen the bridge frequently and was familiar with the building of county bridges.

. . I could not see that bridge good until I got in thirty feet of it, because it is down in a cut. It was below me. I was up above it. I was going above it until I got within thirty or forty feet. When I got up there I didn't know whether it was high enough or low enough, and started down. I saw it just as I started down and could not stop. I do not know that the bridge is in sight fifty or seventy-five yards up that road. It might be; I did not look to see. I would not swear a man could not get on the top of three bales of cotton and see the subway that distance. It was in the bright open daylight, ten o'clock in the morning. . . If I had remained seated on the top bale of cotton the beam would have struck me about the middle of the breast.

. . If I had had my hand in a natural position instead of up against the bale of cotton it would not have struck it then. I don't know that it entirely cleared the top bale. I think a little cotton was left on the trestle. I am not right certain about that. I do not know that two bales of cotton with one bale on top of them would clear that thing a foot or more. It will not clear it more than three or four inches. It cleared my head three or four inches. . . The left hand was the one was hurt by the trestle. I don't know whether I had it above the bale of cotton or not. I only know I was trying to get down."

A witness introduced by the plaintiff testified, that he thought a person sitting on top of a bale of cotton which rested on two others could see the subway a hundred yards before reaching it; that, from his knowledge of the place, he thought an ordinary wagon with three bales of cotton, two lying down and one on top of them, would clear the bridge about ten inches; that the subway had been in its present condition for about fourteen years, and no one had previously been injured by going under it; that the subway from top to bottom was in plain view of a person walking on the ground for two hundred yards before reaching it, following the direction which the plaintiff pursued; and that it would be obvious to the witness for two hundred yards before reaching the subway, with two bales of cotton on a wagon, that it would be dangerous to go under it. He also testified that "I think as a matter of fact it would be apparent, to an ordinarily prudent man coming down the street on top of two bales of cotton, that it was dangerous to undertake to go under that subway. It

would be apparent to a man of ordinary observance." This last statement was admitted over objection. On the close of the evidence for the plaintiff the court granted a nonsuit. The plaintiff excepted.

Marcus W. Beck and Robert T. Daniel, for plaintiff.

Robert L. Berner and Hall & Cleveland, for defendant.

PENNSYLVANIA CASUALTY COMPANY *v.* THOMPSON.

1. In the absence of a legal return of service, the court is without jurisdiction to render a judgment by default.
2. Where an entry of service which failed to show that the defendant had been served was cured by amendment at the trial term, it was error to refuse to allow the defendant to demur and plead instanter to the suit.

Argued May 18, — Decided January 14, 1905.

Action on insurance policy. Before Judge Reagan. Henry superior court. December 19, 1904.

Gleaton & Gleaton, for plaintiff in error.

Brown & Brown, contra.

FISH, P. J. Suit was brought by B. F. Thompson against the Pennsylvania Casualty Company, of Scranton, Pa., returnable to the April term, 1904, of Henry superior court. The sheriff made the following return of service: "I have this day served E. T. Moore, agent, personally, with a copy of the within bill and process. This April 1, 1904." Judgment by default was rendered at the appearance term. At the trial term the defendant appeared and moved to dismiss the case for want of service, which motion was overruled. On motion of the plaintiff the sheriff was then allowed to amend his entry of service as follows: "By permission of the court I hereby amend my entry of service, by saying that I served the defendant company, the Pennsylvania Casualty Company, of Scranton, Pa., by personally serving E. T. Moore, their agent, with a copy of the within writ and process. This April 1, 1904." As a matter of fact, this amendment was allowed October 17, 1904. The defendant then moved to open the default, offering to pay the accrued costs, and asked leave to demur and answer instanter. This motion and request the court refused. The defendant excepted pendente lite to each of

the several rulings mentioned. The trial resulted in a verdict for the plaintiff. The defendant's motion for a new trial having been overruled, it excepted, assigning error upon the refusal of a new trial and upon its exceptions pendente lite.

According to the original entry of service, only E. T. Moore as an individual had been served (*Burnett v. Central R. Co.*, 117 Ga. 521), and the judgment by default was void, as the court had no jurisdiction to render it, the defendant company not having been served. *News Printing Co. v. Brunswick Publishing Co.*, 113 Ga. 160. It follows that the motion by the defendant company to dismiss the case should have been sustained (*Stewart Lumber Co. v. Perry*, 117 Ga. 888), if the return of the sheriff had not been amended. The return, however, was amendable so as to include all the facts of a good service, if such facts existed; such as that Moore was the agent of the defendant company, and that the company had been served by personally serving him as its agent. *Western & Atlantic R. Co. v. Pitts*, 79 Ga. 532. It is true that the amendment of the return related back to the making of the original return of service, but its effect was not to render valid a judgment by default which, as we have seen, was void for want of jurisdiction in the court to render it. The company was first properly in court when the amendment of the original entry of service was made by showing service upon it, and it then had the right to demur and plead instanter to the suit. There was no question as to the form or matter of the demurrer or answer. In *Gordon v. Hudson*, 120 Ga. 698, it was held: "Where a plea and a demurrer have been filed after the expiration of the time allowed by law, but the case has never been marked 'in default,' it is error, on the call of the case for a hearing, to dismiss the plea and the demurrea because not filed in time." In that case there had been no entry of default. In the case in hand there had been such an entry, but it was void; so the ruling in the case cited is directly in point. The question here decided was not involved in *Southern Bell Tel. Co. v. Parker*, 119 Ga. 721, relied on by counsel for the defendant in error. In that case the court expressly declined to pass on the question, for the reason, as stated, that it did not appear to have been raised in the trial court, and there was no assignment of error bringing it in review.

As the court erred in refusing to allow the defendant to demur and plead, it is unnecessary to pass upon the assignments of error made in the motion for a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

ELLIS *v.* STEWART *et al.*

COBB, J. 1. A forcible-entry proceeding, under the Civil Code, § 4823, is, after service of the notice therein required, a "pending proceeding," within the meaning of the Civil Code, § 4950, which will authorize the judge of the superior court of the county in which such proceeding is instituted to entertain an application to enjoin the same at the instance of the defendant, notwithstanding the plaintiff may be a resident of another county. *Moore v. Medlock*, 101 Ga. 94; *Dawson v. Equitable Mfg. Co.*, 109 Ga. 389; *Townsend v. Brinson*, 117 Ga. 375.

2. The evidence being conflicting on material issues in the case, the discretion of the judge in refusing to grant an injunction will not be interfered with.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 18, — Decided June 14, 1905.

Petition for injunction. Before Judge Reagan. Fayette superior court. February 4, 1905.

J. F. Golightly, for plaintiff. *J. W. Wise*, for defendant.

CONRAD *v.* KENNEDY *et al.*

LUMPKIN, J. 1. In order to admit in evidence in this State a transcript of a will and its probate in another State of the Union, it is not sufficient that the clerk of the court where the probate was made shall certify under the seal of the court that the transcript is correct as appears of record in his office, but it is also necessary that the judge, chief justice, or presiding magistrate of the court shall certify that the attestation is in due form. Civil Code, § 5237.

2. Where the correct rejection of a transcript of a will and its probate from another State necessitates the grant of a nonsuit, rulings as to other evidence, whether correct or erroneous, will not cause a reversal.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 18, — Decided June 14, 1905.

Ejectment. Before Judge Lewis. Laurens superior court. July 28, 1904.

John M. Stubbs, S. B. Baker, and Akerman & Akerman, for plaintiff. *William Faircloth, G. H. Williams, W. E. Simmons and J. K. Hines*, for defendants.

WARREN *v.* GAY, next friend.

1. When the charge of the judge is considered as a whole, the instructions as to the degree of proof required to authorize a decree for the specific performance of a parol contract for the sale of land were simply that the minds of the jury must be clearly satisfied by unequivocal testimony that such a contract had been entered into, and when so construed the instruction was not erroneous.
2. The evidence warranted the verdict, and no reason appears for reversing the judgment.

Submitted May 18, — Decided June 14, 1905.

Ejectment. Before Judge Lewis. Laurens superior court.
October 3, 1904.

Norman T. Gay brought an action of ejectment in the common-law form against Warren and Conner, to recover possession of a lot of land in the 12th district of Laurens county, and mesue profits. Subsequently he brought, through his next friend, C. M. Gay, an equitable petition against the same parties, alleging that they were in possession of the lot of land referred to and were destroying the growing trees thereon, and prayed for an injunction and for a recovery of the land. Attached to the petition was an abstract of title, originating in a grant from the State, and showing that the plaintiff claimed to derive title through McRae, who claimed under a conveyance from Powell, who from various conveyances had derived title from the original grantee. It also appeared from the abstract that Powell had obtained a conveyance from Emanuel Gay, who seems to have had some claim to the land not connected with the original grantee. Warren filed an answer, in which he alleged, that he was in possession and claimed title to the land; that Conner was merely his tenant; that he had bought the land in dispute from McRae before McRae sold and conveyed to the plaintiff; and that C. M. Gay, the father of the plaintiff, a minor, who represented his son in the transaction, had notice, at the time he purchased from McRae and received the deed to his son, of the

contract of sale which had been entered into between McRae and the defendant. The defendant alleged, that McRae agreed to sell the land in dispute to him for \$500; that he had paid \$310 of the purchase-money, and had tendered to McRae on various occasions the balance of the same; that he had gone into possession on the faith of this contract, and had been ever since in peaceable possession of the property. He denied the trespasses alleged, and that the land was worth for rent the amount claimed; and prayed that McRae be made a party, that the parol contract between him and McRae be specifically performed, that a decree be entered declaring that he was the owner of the land, that his possession be quieted as against the claim of the plaintiff, that the deed from McRae to the plaintiff be canceled, and for general relief. McRae was by proper order made a party to the case. The two cases were by order of the court consolidated, and on the trial a verdict was rendered in favor of the plaintiff for the premises in dispute and \$442 mesne profits, and in favor of the defendant against McRae for \$10, which had been paid as earnest money to bind the bargain which the defendant alleged had been made between him and McRae for the sale of the land. Warren moved for a new trial, on the general grounds, and on grounds assigning error upon different portions of the charge of the judge. The motion was overruled, and Warren excepted.

James K. Hines and Griner & Adams, for plaintiff in error.
E. D. Graham, contra.

COBB, J. 1. The judge charged the jury as follows: "I charge you that in order to establish a parol contract for the sale of land that would be a basis of recovery for defendant and a verdict in his favor for specific performance, the evidence must be so clear and unequivocal as to satisfy your minds to a reasonable certainty that such a contract was made." This charge was alleged to be erroneous, because it required a higher degree of proof than the law demands. Error was also assigned upon other portions of the charge in which the judge used similar language. He also stated, in the concluding portion of the charge, that the jury were to be governed in this case, as in all other cases, by the preponderance of testimony and by the rules of law to which he had called their attention, and stated that by

the preponderance of testimony was meant that superior weight of testimony in favor of one contention rather than the other, and while it might not relieve the minds of the jury entirely from doubt, if it was of such character and force as to incline their minds to one contention rather than to another, it was sufficient to authorize them to base a verdict upon. In *Printup v. Mitchell*, 17 Ga. 558 (16), it was held that a parol contract for the sale of land, like the reformation of a deed by parol proof, should be made out "so clearly, strongly, and satisfactorily, as to leave no reasonable doubt as to the agreement." As to the rule in reference to the reformation of written instruments by parol evidence, see *Wyche v. Greene*, 11 Ga. 160 (4), 171. In *Shropshire v. Brown*, 45 Ga. 175, it was said that to entitle a complainant to a decree for specific performance of a parol contract for the sale of land, the contract must be established "with reasonable certainty." In *Schnell v. Toomer*, 56 Ga. 170, Judge Bleckley, in referring to the rulings in the 11th and 17th Ga. Reports and in another case, said that what was meant by proof beyond a reasonable doubt in such cases was such proof as would "clearly satisfy the minds of the jury of the truth of the plea." He took occasion to suggest that as "reasonable doubt" was a phrase more appropriate to criminal cases, its employment to instruct the jury in civil cases had best be avoided. In *Beall v. Clark*, 71 Ga. 818, the ruling in the 17th Ga. was followed in terms. See also, in this connection, *Poullain v. Poullain*, 76 Ga. 420 (2). In *Harper v. Kellar*, 110 Ga. 423, the rulings in the 17th, 45th, and 71st Ga. Reports were quoted with approval, and other authorities to a similar effect were referred to. In *Dwight v. Jones*, 115 Ga. 744, it was said: "It is well settled that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement." The judge in the charges complained of seems to have followed the suggestion of Judge Bleckley in the 56th Ga., and avoided the use of the expression "reasonable doubt," but he did use the phrase "reasonable certainty." It has been held that an instruction to the jury that they must be satisfied to a "moral and reasonable certainty" is the same in effect as saying that they must be satisfied beyond a reasonable doubt. See *Bone v. State*,

102 Ga. 387. When the various portions of the charge in reference to the degree of proof are considered together, the effect of the instructions was simply, that this was a civil case, that the jury were authorized to reach a conclusion from the preponderance of the evidence, but that this preponderance should be such in this particular case that before they could find in favor of the parol contract they must be clearly satisfied of the existence of the contract. This is the law. It may be that, under the rulings which have been referred to, an instruction that the jury should be satisfied of the existence of the contract beyond a reasonable doubt would not have been erroneous; but it is not necessary in this case to make a ruling to this effect. The judge did not place this burden upon the defendant in his charge, when it is considered in its entirety. The use of the words "reasonable certainty," when taken in connection with other portions of the charge, imposed upon the plaintiff no greater burden than to satisfy the minds of the jury by clear and unequivocal evidence that the parol contract which he relied on had been entered into. We desire to take this occasion to emphasize the suggestion made by Judge Bleckley, that the instruction in cases of this character should be simply to the effect just indicated.

2. The charge, when considered as a whole, fairly submitted to the jury the issues involved in the case; and if there were any errors at all in the charge, they were not of such a character as to require the granting of a new trial. The evidence, though conflicting, amply warranted the verdict, and no reason appears for reversing the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

McCOMB *et al.* v. HINES.

FISH, P. J. 1. The Supreme Court will not review the evidence in a case when it is apparent that there has been no bona fide effort to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements, motions, and arguments of counsel, rulings of the court, evidence to which objections were sustained, and also with colloquies between counsel and court; none of which could properly have been placed in a brief of evidence. *Equitable Mortgage Company v. Bell*, 115 Ga. 651; *Graham v. Bazley*, 117 a. 42; *Wall v. Mercer*, 119 Ga. 346.

2. Where, in such a case, no question is presented for decision which can be determined without reference to the evidence, the judgment of the court below must be affirmed.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 18, — Decided June 14, 1905.

Money rule. Before Judge Lewis. Baldwin superior court.
January 9, 1905.

D. B. & D. S. Sanford and J. T. Allen, for plaintiffs in error.
Hines & Vinson, contra.

MCWHORTER v. O'NEAL

1. As a general rule, equity will not decree the reformation of an instrument at the instance of one who is a mere volunteer and who was not a party to the instrument.
2. It is error for a judge to instruct the jury upon an issue made by the pleadings which has been expressly abandoned in open court during the progress of the trial, and in a close case this will be a sufficient reason to require a new trial.
3. Other than as above indicated, there was no error requiring the granting of a new trial.

Submitted May 19, — Decided June 14, 1905.

Equitable petition. Before Judge Lewis. Greene superior court. December 31, 1904.

Joshua O'Neal filed an equitable petition against Edith McWhorter and her guardian, B. F. McWhorter. The petition alleged, that Anna O'Neal, wife of the plaintiff, died intestate, leaving him as her sole heir; that she left no debts, and he was entitled to take possession of her estate without administration; that after her death he was approached by B. F. McWhorter, who fraudulently represented to him that his wife had left a valid will giving her property to the defendant Edith McWhorter; and that McWhorter thereupon, by the use of fraud and misrepresentations, induced him to sign a paper relinquishing his interest in his wife's estate to Edith McWhorter, who was his wife's niece. The paper thus signed was a contract with B. F. McWhorter, as guardian of Edith McWhorter, in which the plaintiff agreed "to release unto the said second party all claims or titles to all live stock of every kind, all provisions and sup-

plies, farming utensils, all growing crops for the present year, on lands in Penfield, Ga., owned by Mrs. Anna O'Neal at the time of her death, that he, the said first party, might have to any of said property," and McWhorter, as guardian, agreed to release to the plaintiff certain property owned by Mrs. O'Neal, not included in the foregoing description; and it was declared that "this contract is to adjust and settle all differences between the parties to this contract, and is made for the special purpose of avoiding any litigation between said parties." The plaintiff delivered to McWhorter a large amount of the personalty, a list of which is attached to the petition. The petition alleged, that McWhorter was the brother of the plaintiff's wife, that the plaintiff had great confidence in him, and that the contract was the result of surprise and gives an undue advantage to McWhorter. The plaintiff prayed for a cancellation of the contract. The defendants filed an answer, in which they denied the allegations of fraud, surprise, misplaced confidence, etc. By way of special plea they alleged, that, prior to her marriage to the plaintiff, Mrs. O'Neal (then Mrs. Grant) executed a will, in which she left practically her entire estate to Edith McWhorter; that after the marriage, for the express purpose of making the will effective, the plaintiff and his wife entered into a contract, the material parts of which are in substance as follows: Joshua O'Neal agrees, for a consideration herein contained, to bequeath and give to Anna O'Neal in fee simple all rights that he may have in described real estate; and in consideration of such gift, Anna O'Neal agrees to relinquish her right to dower, homestead, year's support, or in any way whatever, in property of Joshua O'Neal other than that described. The object of this agreement is to prevent any disagreement that may occur in the event of the death of either of the parties hereto. (The agreement is set out in full in 121 *Ga.* 540.) It is alleged, that, at the time this agreement was entered into, it was the intention of the parties that neither should inherit from the other in case of his or her death, and that the purpose of the contract was to make the will effective; that the contract made by plaintiff with McWhorter was for the purpose of carrying out this intention; that plaintiff well knew of his wife's will, and knew that it was the only will in existence after her death which was made by her. The prayer of the

answer was that the contract of plaintiff with McWhorter and the agreement between plaintiff and his wife be carried out. At the trial the defendants offered an amendment to their plea, in which amendment it was alleged, that the plaintiff did not have any rights as heir at law of his wife, because he had relinquished the same by his agreement with her; that if the paper does not show this to be a proper construction of its terms, it is ambiguous; and it was prayed that if the paper should be construed so as not to prevent the plaintiff from inheriting from his wife, it be reformed so as to contain such provisions. On August 10, 1904, the court passed an order refusing to allow this amendment. The plaintiff filed a written demurrer to the special plea referred to, and moved to strike that portion of the answer and the exhibits relating thereto, for the reason that it was not alleged that the will was a valid will, or had ever been probated; that the contract between O'Neal and his wife is unambiguous, and is irrelevant to the present issue; and nothing alleged in the plea or set out in the exhibits constitutes any defense to the action; and also upon the ground that the contract between Mrs. O'Neal and her husband is void, not having been approved by a judge of a superior court. On August 10, 1904, this demurrer was sustained. The trial resulted in a verdict in favor of the plaintiff and a decree for cancellation. The defendants made a motion for a new trial, which was overruled. They assign error upon the exceptions pendente lite taken to the refusal to allow the amendment, and also on the judgment overruling the motion for a new trial. No exception was taken to the judgment sustaining the demurrer to the plea.

James Davison and James B. & Noel P. Park, for plaintiffs in error. *Samuel H. Sibley*, contra.

COBB, J. 1. The amendment to the plea was offered and rejected on the same day that the portion of the plea which was sought to be amended was stricken on demurrer. It does not appear which order was passed first. If the original plea was actually stricken before the amendment was offered, that would have been a good reason for disallowing the same. On the other hand, if the amendment was offered and rejected before the plea was stricken, the amendment should not have been rejected un-

less it was bad in substance. But without reference to this question, we think the amendment was properly disallowed, because it was bad in substance. The contract between O'Neal and his wife was sought to be reformed at the instance of Edith McWhorter, who was a mere volunteer, and who had no interest whatever in the subject-matter of the contract at the time of its execution. Even the contingent interest as a prospective legatee, which she had under the will of her aunt, executed before the latter's marriage to O'Neal, did not exist at the time this contract was signed. The power of a court of equity to reform contracts is one exercised with caution, even at the instance of the parties or claimants for value, and the circumstances must be peculiar in their nature before a court of equity will interfere at the instance of a volunteer, if it will interfere at all at the instance of such a party. *Gould v. Glass*, 120 Ga. 51 (5). There was nothing in the averments of the plea which would make the case such a peculiar one as to take it out of the general rule refusing the equitable relief of reformation to a mere volunteer.

2. The plaintiff attacked the contract sought to be cancelled, upon two grounds, alleging first that it was obtained by fraud, and secondly that it was without any consideration. He would have been entitled to prevail if he established either of these propositions. Counsel for the plaintiff in open court abandoned the contention that the contract was without consideration, and thus practically admitted that if the fraud alleged was not established the defendants would be entitled to prevail. The judge in his charge submitted to the jury both the issue of fraud and the question of consideration, and error is assigned upon a portion of the charge in which it is stated that one of the contentions of the plaintiff was that the contract was without consideration. We think this was such an error as would require the granting of a new trial. The evidence was sharply conflicting on the question of fraud, and was of such a character that a jury might with propriety find either way. It is possible that some of the jurors might have been unwilling to find for the plaintiff on this issue, and still have thought that they were authorized under the charge to consider the question whether the contract was without consideration, and may have erroneously reached the conclusion that it was. The effect of the charge, therefore, was to

give to the plaintiff the benefit of a theory set up in the pleadings, but which had been expressly abandoned in open court.

3. With the exception above indicated, the charges complained of were free from any substantial error. Those grounds of the motion for a new trial which allege that the verdict is contrary to specified portions of the charge raise no question for decision, and it is useless to encumber a motion for a new trial with such grounds. If the verdict is contrary to the charge of the court, and the charge is correct, the general grounds of the motion, when considered in the light of the evidence, are sufficient to authorize the granting of a new trial. There was no error in rejecting the evidence of witnesses as to what was the intention of the parties at the time the contract between O'Neal and McWhorter was made. The contract was unambiguous and spoke for itself. Nor was there any error in rejecting the evidence of declarations by Mrs. O'Neal to third persons of affection for her niece. The cordial and affectionate relations existing between the two could be proved by acts and conduct, as was held by the court. The deed from the near relatives of Mrs. O'Neal, who would have been her heirs if she had been unmarried at the time of her death, to Edith McWhorter, was irrelevant to the issue on trial and properly rejected. The evidence as to the existence of relatives of Mrs. O'Neal's former husband was irrelevant, but its admission would not alone have been sufficient to require the granting of a new trial. There was no error in any of the other rulings complained of.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

SAWYER v. GEORGIA RAILROAD AND BANKING CO.

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129	111

The plaintiff brought suit against the defendant for the homicide of her husband, which occurred from his being struck by a freight-train of the defendant while crossing the railroad tracks at a public street crossing in the city of Madison. A verdict was rendered in favor of the plaintiff, a motion for a new trial was overruled, and the defendant excepted. This court held, on the evidence as then presented, that it disclosed that the plaintiff's husband, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence; and reversed the judgment. 112 Ga. 346. On the second trial the evidence for the plaintiff differed in material respects from that on the former trial. It tended to show that

the train which caused the injury was not on schedule time, but more than an hour late, so that there was no reason on the part of the deceased to anticipate its coming; that there were freight-cars standing on the side-track on the side of the railroad which the deceased approached, and within a few feet of the main line, in such position that, together with the depot building and another building 'not far away, they would obstruct the view of the railroad track by the deceased until he passed the end of the freight-cars on the side-track and was near the main line; that the train was running about thirty miles an hour, in violation of an ordinance of the city limiting the speed of railroad trains, crossing the public street where the injury occurred, to six miles an hour. The jury found a second verdict for the plaintiff. A motion for a new trial was made, and the judge (other than the one who presided at the trial) again set aside the verdict, holding that the evidence was substantially the same as when the case was passed on by the Supreme Court. *Held*, that this was error. The evidence on the second trial was materially different from that on the former trial, and the second verdict should have been allowed to stand.

Argued May 19, — Decided June 14, 1905.

Action for damages. Before Judge Lewis. Morgan superior court. December 19, 1904.

Q. L. Williford and *George & George*, for plaintiff.

Joseph B. & Bryan Cumming and *Foster & Butler*, for defendant.

LUMPKIN, J. The headnote will show that on the second trial the case was a proper one for determination by the jury. The judge who presided on the hearing of the motion for a new trial thought that the case was controlled by the ruling made by this court in 112 Ga. 346. In this we think he erred. We have carefully examined the record of the case as it then appeared, and as it is now presented; and we find very material differences. Without setting out the evidence in detail, a few illustrations of the change of status will suffice. On the former trial the principal witness for the plaintiff was one Shields. In his testimony he strongly indicated that the plaintiff's husband could have seen the approaching train; and while some mention was made of the possibility of there being freight-cars on the side-track, it was very vague and uncertain as to the number, position, and effect on the view of the plaintiff's husband while approaching the track. Indeed Shields developed into a most excellent witness for the defense. On the second trial the plaintiff did not introduce him at all, but the defendant did so. The plaintiff introduced as her leading witness one Ike Burton.

Among other things he testified, that there were other cars between the crossing and the depot, one standing where it had been unloaded, and two more in front of the depot; that the depot was within three feet of the side-track; that the car first mentioned was standing between the main road that crosses the track and the depot; that "with that car standing there no one could see down that track until they got on the railroad;" that the train had to pass the depot before it reached the crossing; and that it was running at the rate of about thirty-five miles an hour. Another witness testified that the train which caused the injury was due, according to schedule, at two o'clock and thirty-eight minutes p. m. There was evidence to show that it did not arrive until four o'clock. Some of the other evidence set out in the headnote was before the court on the former trial; but this will suffice to show that there were material differences. We think there was enough to sustain the finding of the jury, and that the second verdict should have been allowed to stand. *Richmond & Danville R. Co. v. Howard*, 79 Ga. 44 (2); *Broyles v. Prisock*, 97 Ga. 643 (6); *Hopkins' Pers. Inj.* §§ 4, 90.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Evans, J., disqualified.

McLENDON v. MACON, DUBLIN & SAVANNAH RAILROAD CO.

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FISH, P. J. When this case was formerly before the Supreme Court (119 Ga. 297), it held that under the law applicable to the evidence submitted by the plaintiff the court did not err in refusing to grant a nonsuit. A careful comparison of the brief of evidence in the former record with the brief of evidence in the present record shows that the evidence submitted in behalf of the plaintiff on both trials was substantially the same. It follows that, under the law of the case as previously announced by the Supreme Court, a nonsuit should not have been granted.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued May 19, — Decided June 14, 1905.

Action for damages. Before Judge Burch. City court of Dublin. December 13, 1904.

Sanders & Davis and S. W. Sturgis, for plaintiff.

John M. Stubbs and Akerman & Akerman, for defendant.

JACKSON v. GREEN *et al.*

Where suit was brought to recover a debt originally due to a man since deceased, the plaintiff claiming the right to recover under the Civil Code, § 3355, par. 1, as the widow of the deceased on whose estate there was no administration, and whose debts she had paid; and where on the trial it appeared from her evidence that she had paid some of her husband's debts before bringing the suit and some afterwards, a nonsuit was properly granted.

Submitted May 19, — Decided June 14, 1905.

Complaint. Before Judge Willis. City court of Columbus. October 7, 1904.

Mollie Jackson brought suit against M. B. Green et al, trustees of Shady Grove Baptist church, on an open account for salary due to her deceased husband as pastor of the church. On the trial the plaintiff offered to amend her declaration, but the court overruled the motion. She testified to the indebtedness due to her husband as pastor of the church. As tending to show her right to bring the suit and recover, she testified as follows: "I am the plaintiff in this case, and the widow of Oliver H. Jackson, who was the pastor of Shady Grove Baptist Church for eleven years previous to his death, which occurred on the 26th day of October, 1890. . . Am the sole heir at law of my deceased husband, and was at the time of his death. I paid all the debts of my husband, most of them before this suit was brought, and some afterwards. . . All of my husband's debts were not paid before this suit was filed."

The court granted a nonsuit, and the plaintiff excepted.

D. L. Parmer, T. W. Grimes, and Goetchius & Chappell, for plaintiff. *Hatcher & Carson*, for defendants.

LUMPKIN, J. (After stating the facts.) This case has been twice before the Supreme Court. *Jackson v. Miles*, 94 Ga. 484; *Jackson v. Miles*, 98 Ga. 512. The record now before us makes no reference to the former adjudications, but is brought up as if it were here for the first time. Whether the court correctly rejected the amendment or not is immaterial, if a nonsuit was rightly granted because the plaintiff was not entitled to maintain the action. The Civil Code, § 3355, par. 1, provides that "Upon the death of the husband, without lineal descendants, the wife is his sole heir, and upon the payment of his debts, if any, may

take possession of his estate, without administration." Prior to the act of December 12, 1882 (Acts 1882-3, p. 47) the code declared that "Upon the death of the husband, without lineal descendants, the wife is his sole heir." (Code of 1882, § 1762.) By that act the clause was added, "and upon the payment of his debts, if any, may take possession of his estate, without administration." As thus amended, the section of the code of 1882 quoted was codified with § 2484 of that code, so as to form a part of § 3355 of the present Civil Code. Prior to the act of 1882 the law did not dispense with administration or vary the general rule that personalty vests in the administrator. There was a provision of this character in reference to the husband (Code of 1882, § 1761), but not as to the wife. *Gouldsmith v. Coleman*, 57 Ga. 425-6. As to the section relating to the husband, see *McLaren v. Bradford*, 52 Ga. 648; *Conyers v. Bruce*, 109 Ga. 190. The right in a widow to dispense with administration and bring a suit on a debt which was due to her deceased husband being statutory, to exercise it she must comply with the statute. "The burden of proof generally lies upon the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential." Civil Code, § 5160. As to when a widow may take possession of her deceased husband's estate without administration, see Civil Code, § 3355, par. 1, supra; *McElhaney v. Crawford*, 96 Ga. 174; *Johnson v. Champion*, 88 Ga. 527; *Towns v. Mathews*, 91 Ga. 546. In *Moore v. Smith*, 121 Ga. 479, this principle was recognized in a case where the sole creditor of the deceased brought suit against his widow, not as executrix de son tort, but as being in possession of the property as sole heir without administration. In the decision it is said: "If the widow have notice of an existing debt of her husband's, she can not take possession of his estate; and if she does so she is a wrong-doer." (p. 482.) The right of the plaintiff to bring an action is generally determined by the status of such plaintiff at the time when the suit is brought; and if the plaintiff then has no title or right to sue, she can not acquire it afterwards and thus sustain the action. See *McElmurray v. Harris*, 117 Ga. 919; *Wright v. Jett*, 120 Ga. 995.

The plaintiff showed by her own evidence that at the time she brought the action she was not authorized to do so by section

3355 of the Civil Code. She produced evidence to show an indebtedness to her husband, but proved that she had no right to sue upon it when the action was brought. A nonsuit therefore resulted.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

123	256
130	198

JARRETT v. McLAUGHLIN.

EVANS, J. To the levy of a mortgage fl. fa. on land four separate claims by different individuals were interposed. All of the claimants being represented by the same counsel, they agreed with the plaintiff in fl. fa. that one only of the claim cases should be tried, and that the others should abide its result. An order of court to that effect was duly passed, that case was brought to trial, and the plaintiff in fl. fa. prevailed. The case was then taken to the Supreme Court for review, and the judgment of the court below was affirmed. (*Taylor v. McLaughlin*, 120 Ga. 703.) Subsequently the claimant in one of the other cases sought to prevent judgment against him from being entered up in accordance with the above-mentioned agreement, filing a motion (styled an "equitable plea") to set aside that agreement. The sole ground of this motion was that the trial judge, in undertaking to perfect a brief of the evidence filed in the case which was tried and lost, improperly inserted therein a recital of facts to which no witness testified, and that the changes so made in the brief of the evidence presented a state of facts which constrained the judgment of affirmance rendered by the Supreme Court. This motion was overruled and judgment against the claimant entered up accordingly, to which action on the part of the trial court exception is taken. *Held*, that there was no merit in the motion to set aside the agreement of the parties, inasmuch as the plaintiff in error voluntarily chose to consent that his case should abide the result of that brought to trial and final judgment, whatever that result might be or however erroneously or through whatever misfortune it might be reached; and therefore he stands in no better position than does the losing party to that case, as to whom the judgment therein is certainly final.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 19, — Decided June 14, 1905.

Levy and claim. Before Judge Littlejohn. Marion superior court. October 25, 1904.

George P. Munro, for plaintiff in error.

J. J. Dunham and J. H. Lumpkin, contra.

FORD v. FARGASON, administratrix.

LUMPKIN, J. There being no error of law complained of, the evidence being sufficient to sustain the verdict, and the presiding judge having refused a new trial, this court will not interfere.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 19,—Decided June 14, 1905.

Foreclosure of lien. Before Judge Raines. City court of Dawson. September 7, 1904.

W. H. Gurr and H. A. Wilkinson, for plaintiff in error.

R. R. Marlin and J. R. Irwin, contra.

CHAMBLESS v. LIVINGSTON.

Cobb, J. 1. When upon the call of the appearance docket no entry of default is made, the court may in its discretion, at a subsequent term, permit a plea to be filed at any time before such entry has been made. *Davis v. Railroad Co.*, 107 Ga. 420 (1); *Gordon v. Hudson*, 120 Ga. 698.

2. In an action for damages for a conversion of personalty, proof of title to the property in the plaintiff, possession in the defendant, a demand for possession, and a refusal by the defendant to surrender the property to the plaintiff, prior to the filing of the suit, makes a prima facie case for recovery, although it does not appear that the defendant was in possession at the time the suit was filed.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued May 19,—Decided June 14, 1905.

Trover—nonsuit. Before Judge Raines. City court of Dawson. October 18, 1904.

Cited, as to nonsuit: *Ga. R.* 43/323; 79/354; 1/381; 2/119; 79/136; 107/806; 115/378; 28 Am. & Eng. Enc. L (2d ed.) 705-6, 712, 686-7.

W. H. Gurr, for plaintiff.

J. R. Irwin and J. G. Parks, for defendant.

123 258
124 271FULGHUM *et al.*, executors, v. STRICKLAND.

A testator made the following bequest: "If I should die before my wife, I give to her a life-estate in all my property, both real and personal, of all kinds whatsoever, as long as she may remain a widow. But in the event of her marriage, then the whole of the estate, both real and personal, shall immediately go to and be distributed or divided equally among the children of my two sisters, Mrs. T., Mrs. F., and my brother A. A. J., each of the above families to share equally, to have one third of my property, both real and personal." *Held*: (1) The bequest was to the children of the named sisters and brother as a class. (2) Only the children of the named sisters and brother take under the will, and the descendants of children who died before the testator take no interest thereunder. (3) The phrase, "each of the above families to share equally," serves to indicate the plan of division, and does not enlarge the meaning of the word "children" so as to include grandchildren.

Argued May 19, — Decided June 14, 1905.

Equitable petition. Before Judge Spence. Terrell superior court. December 2, 1904.

Mrs. Mabel C. Strickland brought suit against the executors of S. T. Jordan, deceased, to recover a legacy claimed under the will of S. T. Jordan. It appears from the petition that Jordan died after the execution of his last will and testament, which is as follows: "I, S. T. Jordan, of the County of Terrell, and State of Georgia, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have the strength so to do, do make and publish this my last will and testament, hereby revoking all wills by me at any time heretofore made; and I commit my soul to God who gave it, and my body I desire to be buried in a neat and Christian manner besides my daughter in the cemetery at Albany, Ga., or, if more convenient, at the feet of my sons at Dover, in the Baptist cemetery. I desire that all my debts that I may owe be paid as they mature, and the remainder of my worldly estate I dispose of as follows: If I should die before my wife, I give to her a life-estate in all my property, both real and personal, of all kinds whatsoever, as long as she may remain a widow. But in the event of her marriage, then the whole of the estate, both real and personal, shall immediately go to and be distributed or divided equally among the children of my two sisters, Mrs. Miles Tanner, Mrs. W. H. Fulghum, and my brother Amos A. Jordan, each of the above

families to share equally, to have one third of my property, both real and personal. My half brothers, N. H. Cornelius, A. Y. A. Jordan, and sisters, Mrs. S. E. Wilson and Mrs. Roberta H. Hannan, each I will one dollar. It is my wish and will during the life of my wife, and as long as she remains a widow, she shall have for her support monthly fifty dollars, arising from the income of my estate, by my executors monthly, and whatever the amount the income of my estate shall exceed this amount above expenses shall be divided equally between my two sisters' named and brother's children, each sister's children one third each, and my brother's children the remaining third." His widow elected to take a certain amount of money in lieu of her life-interest in the estate, which sum has been paid by the executors, and she has agreed, in consideration thereof, that the remainder of the estate may be divided at once according to the terms of the will. At the time of the execution of the will Mrs. Fulghum was dead, and none of her children were minors or living as one family under the same roof. Her children were Amos A. J. Fulghum, the father of petitioner, Mrs. Rogers, Mrs. Page, Mrs. Bryan, William H. Fulghum, and Thomas J. Fulghum. Of these Amos A. J. Fulghum and Mrs. Rogers were dead when the will was executed. Mrs. Rogers left eight children surviving her. Petitioner is the sole child of her father, Amos A. J. Fulghum. At the time the will was executed the other sister of the testator named in the will, Mrs. Tanner, was dead. Mrs. Tanner left several children, all of whom were adults and had families of their own. Amos A. Jordan was dead at the time the will was executed, and his children were all adults with families of their own. Petitioner claims that she is of the blood of Mrs. W. H. Fulghum and is a member of her family, and as such is entitled to a one-sixth part of the estate devised to the children of Mrs. W. H. Fulghum, now in the hands of the executors for distribution, which estate amounts to \$27,000. The executors deny that petitioner is a legatee, and her suit is brought to recover her interest in the legacy. By amendment petitioner alleged, that at the time of making his will the testator well knew his said brother and sisters were dead, that their children had families of their own, and that some were dead leaving children who were his grandnieces and grandnephews; that said testator was fond of

his grandnieces and grandnephews, and was especially fond of petitioner, and had often caressed her and expressed his sympathy and love for her because she had been left fatherless so young in life; that at the time the will was executed the petitioner was only fourteen years of age, and without means of support. The executors demurred to the petition, on the ground that it appeared therefrom that the devise was to certain nephews and nieces of the testator, and that the petitioner was not embraced in that class; that the devise was to the children of the two sisters and brother of the testator as a class, and that the petitioner, being a grandniece, was not comprehended within the meaning of the word "children" as used by the will. The court overruled the demurrer, and the exception is to this judgment.

John R. Irwin, for plaintiffs in error, cited Civil Code, § 3324; *Ga. R.* 8/37; 74/139; 25/549; 30/976; 36/375; 80/675; 82/215; 98/321.

Lavender R. Ray and *James G. Parks*, contra, cited, as to construction of wills, Civil Code, §§ 2324-5; *Ga. R.* 12/47, 155; 27/321; 68/145, 147; 69/198; 110/707; 4/380; 72/850, 856, 858; 115/896. The word "children" may be enlarged by other words, so as to include grandchildren: *Ga. R.* 4/380; 28/357; 30/167; 52/694; 67/546, 554; 69/498; 71/384; 72/858; 80/681; 1 Roper, Legacies, 70; 2 Wm's. Exrs. (7th ed.) 362; 1 Ves. 196; 3 Ves. 258; 7 Allen, 72; 5 Pa. St. 264; 8 Pa. St. 229, 231; 10 Pa. St. 213; 40 Pa. St. 29, 36. Meaning of "children" is enlarged here by the word "family:" Bouv. Law Dict., "Family," "Legatee;" 1 Roper, Leg. 115-117, 92-94, 70; 2 Jarm. Wills, 622-30; 2 Redf. Wills, 71; 2 Wms. Exrs. 1213; Sugd. Powers (4th Lond. ed.) 525; 27 *Ga.* 321; 117 *Pa.* 348; 18 W. Va. 675-84; 3 W. Va. 310; 35 Md. 519-27; 5 Pa. St. 385-9; 5 Maule & Sel. 126-30; 9 Ves. 319-25; 1 Keen, 176; 1 Mylne & Cr. 401; 2 Crompt. M. & R. 638, s. c. 5 Tyrwh. 1013; 6 Ves. Jr. 159; 17 Ves. 255.

EVANS, J. (After stating the facts.) The general rule is that in a devise to children as a class, the word "children" is to be construed as immediate offspring, and will not include grandchildren. So universal has this rule of construction obtained, that Sir William Grant said he "never knew of an instance

where there were children, to answer the proper description, that grandchildren were permitted to share along with them." *Oxford v. Churchill*, 3 Ves. & Beam. 53. This principle is firmly entrenched in the law of this State, and grandchildren can not take under a bequest to children unless there be something in the will to indicate such intention by the testator. *Walker v. Wilkins*, 25 Ga. 549; *Willis v. Jenkins*, 30 Ga. 167; *White v. Rowland*, 67 Ga. 546. It is evident, from a casual reading of the will, that the testator intended that his estate on the marriage of his widow, or upon her death without having again married, should be divided into three equal parts, one of which was to be distributed among the children of Mrs. Miles Tanner, another among the children of Mrs. W. H. Fulghum, and the third among the children of Amos A. Jordan. Unless the use of the word "families" enlarges the meaning of the word "children," the bequest is to the three classes of children, each class to take one third of the estate, and the part devised to the children of Mrs. Fulghum would be divided among her children in life at the testator's death, to the exclusion of the issue of a child who predeceased the testator. *Springer v. Congleton*, 30 Ga. 976; *Davie v. Wynne*, 80 Ga. 673; *Martin v. Trustees*, 98 Ga. 320. The bequest is not to the "families" of the two sisters and the brother, but is to their children. The language of the will is "then the whole of the estate, both real and personal, shall immediately go to and be distributed or divided equally among the children of my two sisters, Mrs. Miles Tanner, Mrs. W. H. Fulghum, and my brother Amos A. Jordan." The personæ designatæ are the children of the testator's sisters and brother. Apparently the testator had in mind a division of his estate among these children, so that all of the children should not share per capita in the whole estate, but that each set of children should participate per capita in the share devised to the particular class. That is to say, the children of Mrs. Fulghum were to share per capita in one third of the estate; the children of Mrs. Tanner were to share per capita in one third of the estate, and the remaining third of the estate was to be divided per capita among the children of Amos Jordan. To make this testamentary scheme perfectly clear, he stated, "each of the above families to share equally, to have one third

of my property, both real and personal." By the use of the word "families" the testator had no intention to broaden or enlarge the word "children," but intended to furnish a plan of division. His intent manifestly was to give a third of his estate to each class of persons, ascertained to be the families of his sisters and brother, consisting of their children. This would seem to be the natural meaning to give to these words used in the particular context. "Each of the above families" was evidently intended by the testator to refer to the three sets of children to whom, as three distinct classes of persons, he had devised the residuum of his estate.

The English courts have frequently been called on to define the word "family," and to construe wills where the bequest or devise was to one's family. In some instances this term has been given a very limited and circumscribed meaning, and in others a more enlarged operation, varying according to the subject-matter of the gift and the context of the will. The question has been rather infrequent before the courts of this country. In all of the cases examined (and I have examined quite a number) the legacy or devise was to a family. I have not been able to find a case where the legacy was to sets of children according to families. Now it has been held that a bequest to one and his family is equivalent to a bequest to one and his children. 12 Am. & Eng. Enc. L. (2d ed.) 870. The testator's intent in such cases is the controlling question, interpreted in the light of the testamentary scheme. What was the scheme of this testator? Firstly, it was to divide his estate into three equal parts; secondly, it was to give one part to each of three named sets of children; thirdly, that each set of children was to take their separate portion as a class. That this was his general scheme is made still clearer by the words used in disposing of the surplus above the income devised to his wife: "and whatever amount the income of my estate shall exceed this amount above expenses shall be divided equally between my two sisters' named and brother's children, each sister's children one third each, and my brother's children the remaining third." Here we find the same general purpose of the testator in dividing the surplus income into three equal parts, and a division thereof between three sets of children, each set taking a third. In directing a division of the surplus in-

come the testator did not designate the different sets of children as different families, but the language which he employed throws a flood of light on the meaning he gave to the word "families" in the prior clause of his will.

But it may be said that this construction will exclude descendants of children who predeceased the testator, and who were equally dear to him as his nieces and nephews. The reply to this is twofold. If to exclude these would work a hardship, so also it would be a hardship to the nieces and nephews to reduce their share. But the all-sufficient answer is that the testator in his will did not name them as the objects of his bounty. The plaintiff's petition discloses that at the time the will was made her father was dead and the testator knew that fact. Yet with this knowledge he bequeathed his property to his nieces and nephews without providing for the children of a deceased nephew. The hardship resulting from excluding the plaintiff from taking under the will could not be greater than it was in the case of *Crawley v. Kendrick*, 122 Ga. 183; and the court there said: "When he [testator] made his will he knew that his son then had a child in life, with the possibility of others being born, and that the plaintiff in error, a child of a deceased daughter of a son, was also then living. There is not a word in his will which indicates that the grandchild of his son should take under the plain designation of children of his son." Courts are to construe wills, and can not make wills. Only the children of the named sisters and brother take under this will, and the descendants of children who died before the will was made take no interest thereunder.

The court should have sustained the demurrer.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

HAYSLIP, guardian, v. GILLIS, guardian.

Where one without legal authority took a child of tender years from the county of its domicile into another county, where a third person took it into her family and cared for and supported it for a number of years, the ordinary of the latter county, in the absence of any choice by the minor making that county his domicile, has no jurisdiction to appoint a guardian for it. *Darden v. Wyatt*, 15 Ga. 414, distinguished.

Submitted May 19, — Decided June 14, 1905.

Levy and claim. Before Judge Littlejohn. Lee superior court. August 1, 1904.

Allen Fort & Son, for plaintiff in error, cited Civil Code, §§ 2516, 1830, 1827; *Ga. R.* 78/607; 74/539; 25/613; 7/732.

Long & Son, by *Z. D. Harrison*, and *Culberson & Johnson*, contra, cited *Ga. R.* 15/414; 25/613; 34/258.

FISH, P. J. It appears from the record that Maggie Hayslip's father, Ben Hayslip, at the time of his death was a resident of Lee county, where he owned a parcel of land. She was a child of very tender age when her father died. Her mother's death occurred before her father's. Soon after Ben Hayslip died his brother, W. T. Hayslip, took the child to his mother's to live. The record does not disclose in what county his mother resided. Maggie lived with her grandmother until the latter died, when her husband, one English, took charge of the child, giving her to one Patterson, who carried her to Worth county where "she was among several families for a while," until Mrs. Elizabeth Gillis, who resided in Worth but who was of no kin to Maggie, took her to live with her. At this time Maggie was about three years old. She continued to live with Mrs. Gillis, who cared for, supported, and educated her, for nine years or more. No one else ever contributed anything to the child's support. On September 1, 1902, while she was still living with Mrs. Gillis, the ordinary of Worth county appointed Mrs. Gillis guardian of Maggie's person and property. On May 4, 1903, the ordinary of Lee county appointed W. T. Hayslip guardian of Maggie's person and property. Mrs. Gillis, as guardian, advertised the land in Lee county belonging to the child to be sold on the first Monday in January, 1904, when W. T. Hayslip, as guardian as aforesaid, interposed his claim to stop the sale. On the trial of the claim case the foregoing facts were adduced, and a verdict found against the claim of Hayslip. He moved for a new trial, upon the general grounds that the verdict was contrary to law and the evidence, and without evidence to support it, and excepted to the overruling of his motion. The sole question presented for determination is, who is, under the facts, the legal guardian of Maggie Hayslip? The Civil Code, § 2516, provides that "the ordinary of the county of the domicile of a minor having no guardian

shall have the power of appointing a guardian of the person and property, or either, of such child." The solution of the question, therefore, depends upon the domicile of Maggie Hayslip, the minor. Where was her domicile, in Worth county or in Lee? At the time of her father's death her domicile was unquestionably in Lee. Has it since been legally changed? We think not. When less than three years old she was carried to Worth county by Patterson, into whose custody her step-grandfather had placed her, and, after being for a time with several families, she was taken by Mrs. Gillis. None of these people was related to the child, and none of them had any legal right to change her domicile. That their motive may have been generous and commendable can not affect the question. The domicile of her father at his death continues to be her domicile until it is legally changed. The general rule is that an infant, on account of its presumed want of discretion, is incapable of changing its own domicile. Our code, however, modifies the rule. It declares: "The domicile of every minor shall be that of his father, if alive, unless such father has voluntarily relinquished his parental authority to some other person. In such event the domicile of the minor shall be that of his master, if an apprentice, or his employer; if neither master nor employer, then the place of his own choice; if the father be dead, then the domicile of the minor shall be that of his guardian, if he has one in this State; if no guardian, then of his mother, if alive; if no mother, then of his employer; if no employer, then of his own choice. The domicile of a bastard shall be that of his mother." Civil Code, § 1827. The record fails to disclose that the minor in this case has ever exercised the privilege given her under the law of choosing a domicile for herself. In other words, it does not appear that she has done anything to change the domicile fixed for her by the law at her father's death. As her domicile was never changed from Lee county to the county of Worth, the ordinary of the latter county had no jurisdiction to appoint a guardian, and his action in the matter was void.

Counsel for defendant in error relied on the decision in *Darden v. Wyatt*, 15 Ga. 414, which was as follows: "A father dies in a county, leaving minor children; soon afterwards, the mother dies, leaving minors in the same county. Then the grandfather

of the minors, who resides in another county, carries the minors to his home in that county, to live with him. Whilst they are thus living with him, an uncle applies, in the first county, for letters of guardianship of the minors: *Held*, that the court of ordinary for the first county had no authority to grant the letters; but that the authority to grant them was in the court of ordinary of the second county." That decision was put upon the act of 1838, which declared that "the place where the family of any person shall permanently reside, in this State, and the place where any person having no family shall generally lodge," shall be held and considered as the most notorious place of abode of such person or persons, respectively." In construing the act the court said: "This act, by its title, preamble, and body, extends to all persons who are citizens or *inhabitants* of this State. It therefore extends to minors. It makes the test of residence, of those who have no family, the place where they 'shall generally lodge'; that, therefore, is the test for minors in this case." That case was tried in 1854. Our first Civil Code, which went into effect in 1863, changed the act of 1838 so as to make it apply only to persons of "full age." (Code 1863, § 1644, which is § 1824 of our present Civil Code.) The provisions contained in § 1827 of the present Civil Code, which we have quoted, in reference to the domicile of minors, also appear in the Code of 1863, § 1647. On account of these changes made by the Code of 1863 in the law as it existed in 1854, when *Darden v. Wyatt* was decided, that case is not controlling. Moreover, in that case the grandfather of the minors took them from the county of the domicile of their deceased father and carried them to his home in another county, there to live with him; whereas, as we have shown, the minor in the present case was carried from the county of her deceased father's domicile and cared for by persons who were not her kin. Therefore, if the court had broadly held in the *Darden* case (as perhaps it might properly have done,—see *Lamar v. Micou*, 114 U. S. 218) that the grandfather of an infant whose parents are both dead may change the domicile of the infant from one county to another, so as to vest in the ordinary of the latter county jurisdiction to appoint a guardian, such a decision would not have been contrary to the case at bar, for the reason just indicated. Accordingly we hold

that under the facts and the law as we conceive it to be, a verdict was demanded in favor of the claimant, and the court below erred in not granting a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

HARRELL, administrator, v. HARRELL

1. When a person dies without lineal descendants, his widow as sole heir at law can not, upon payment of his debts, take possession of the estate without administration, when there is in existence an unprobated paper apparently executed in due form of law as the will of the deceased, until there has been a judgment of the court of ordinary that such paper is not the will of the deceased.
2. A legacy is not a debt within the meaning of that provision of the code authorizing a widow, under certain circumstances, to pay the debts of her deceased husband's estate and take possession of the same.

Argued May 19,—Decided June 14, 1905.

Complaint. Before Judge Littlejohn. Webster superior court. October 3, 1904.

Mrs. Lizzie Harrell brought suit against the administrator of the estate of D. B. Harrell, upon two promissory notes, each signed by D. B. Harrell, one for \$500, payable to John Harrell or order, and the other for \$1,000, payable to the order of the plaintiff. She alleged, that she was the widow of John Harrell, who died intestate leaving no descendants, that there were no unpaid debts owing by him, and that therefore she was the owner and holder of the note payable to her husband. The defendant filed an answer in which he denied the material allegations of the petition, and pleaded non est factum and payment as to both notes. At the trial the plaintiff introduced the notes and proved their execution by the intestate of the defendant. It appeared, from the evidence, that John Harrell died testate, and that his will had never been probated or admitted to record. The will was introduced in evidence, and from it it appeared that the testator gave to a person who was his niece, but who was described as his adopted daughter, a legacy of \$3,000, and the rest of his estate to his wife, who was nominated as the executrix of the will. There was no evidence that his niece had been legally adopted as his daughter. There was evidence that after the death of John

Harrell the plaintiff delivered to the niece property of the value of \$3,000, and took her receipt in full payment of all claims which she had against the estate of her uncle, either by will or otherwise. There was no evidence authorizing a finding for the defendant on either of the special pleas referred to. The court directed a verdict for the plaintiff, and the defendant excepted.

G. Y. Harrell, for plaintiff in error. *J. B. Hudson*, contra.

COBB, J. So far as the verdict relates to the note for \$1,000, payable to the plaintiff, the evidence demanded a finding in her favor. But the evidence neither required nor authorized a finding in the plaintiff's favor as to the \$500 note payable to John Harrell. The general rule is that the right to recover upon a chose in action payable to a person since deceased is in the legal representative of the estate of such person. One exception to this rule is where a husband dies intestate, leaving no lineal heirs, in which case the law allows his widow to pay the debts due by his estate and take possession thereof. In such a case the widow has a right to bring suit upon a chose in action belonging to the estate of her deceased husband. The section of the code which confers this right upon the widow is in that chapter which deals with the subject of title by descent and distribution, lays down the rule to determine who are heirs at law of a deceased person, and is in the following language: "Upon the death of the husband, without lineal descendants, the widow is his sole heir, and upon the payment of his debts, if any, may take possession of his estate, without administration." Civil Code, § 3355, par. 1. This section has no application whatever in a case where a husband dies testate. It confers no authority upon the widow to settle with legatees. A legacy is in no sense a debt, and certainly is not a debt within the meaning of this section. A debtor is never required to pay to any person except one whose receipt would protect him against the creditor or his legal representative. A debtor to one who dies leaving a paper apparently executed in due form of law as a will would not be fully protected by a payment to the widow or heirs at law, until it has been judicially determined that this paper is not the will of the deceased. It is the duty of all persons having possession of such papers, upon the death of the person whose name is signed thereto, to file the

paper with the ordinary; and more than this, it is the duty of the ordinary, upon information that such a paper is in existence, to require the same to be filed in his office. Civil Code, § 3288; *Israel v. Wolf*, 100 Ga. 339. So long as such a paper is in existence, either filed or unfiled, a debtor to the estate of the deceased pays at his peril to an heir claiming to represent the estate in that capacity only. While it appears from the evidence that the legatee and the widow have settled, still the legatee is not a party to this suit, and there is nothing to prevent her from compelling a probate of the will and attacking this settlement for any reason that may exist. The plaintiff alleged in terms in her petition that John Harrell died intestate. Her right to recover depended upon proof of this allegation. The uncontradicted evidence shows that he did not die intestate, and therefore the plaintiff had no right to recover upon the \$500 note. The judgment is affirmed as to the recovery upon the \$1,000 note, upon condition that the plaintiff write off all of the recovery based upon the \$500 note, nothing in so doing to prejudice the right of the legal representative to bring another suit on that note. If the recovery be not so written off, the judgment will be reversed; the defendant in error in either event to pay the costs of this writ of error.

Judgment affirmed, on condition. All the Justices concur, except Simmons, C. J., absent.

JESUP v. ATLANTIC AND BIRMINGHAM RAILWAY COMPANY.

EVANS, J. The plaintiff having proved his case as laid, the trial judge erred in awarding a nonsuit. *Kelly v. Strouse*, 116 Ga. 881-883.
Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued May 19, — Decided June 14, 1905.

Action for damages. Before Judge Crisp. City court of Vienna. October 20, 1904.

Hill & Royal, for plaintiff.

J. L. Sweat and Crum & Jones, for defendant.

ALBANY PINE PRODUCTS COMPANY v. HERCULES
MANUFACTURING COMPANY.

Where it appears that an entry was made by the judge on the docket of "in default," and it also appears that on the same day the judge defaced the entry by passing his pen through it, in the absence of proof to the contrary such mutilated entry will be treated as the correction of an inadvertence, and not as an "in default" judgment.

Argued May 27, — Decided June 14, 1905.

Complaint. Before Judge Crosland. City court of Albany.
September 13, 1904.

The Hercules Manufacturing Company brought suit, in the city court of Albany, against the Albany Pine Products Company, upon an open account. The process was returnable to the May term, 1904, and was duly served upon the defendant. At the trial term the plaintiff made a written motion to strike the defendant's plea, upon the following grounds: "First: Said plea was not filed at the first term of said court, as required by section 5052 of the Code of 1895; said plea was not filed in said case until after said court had fully and completely adjourned. Second: Defendants then sought to file said plea after said court had adjourned as above stated, by an order of said court (R. Hobbs) which now appears on the foot or bottom of said plea, authorizing the filing thereof. Third: Plaintiffs aver that said order admitting said plea to be filed as aforesaid is a nullity; that the said court had no legal right or authority to pass such an order admitting and authorizing said plea to be filed at said time and thereby opening said case which had gone by in default." Upon the hearing of the motion to strike the plea the deputy clerk testified as follows: "The May term, 1904, of said court convened at about nine o'clock a. m. on the 9th day of May, 1904, and was in session for only about two hours, during which time the appearance docket was called, his honor, Richard Hobbs, now deceased, then judge of said court, presiding; and at about eleven o'clock a. m. of the same day the court took a recess to the 23d day of May, 1904, said Hobbs, the then judge of said court, announcing from the bench that the court would take a recess until the 23d day of May, 1904; that during the afternoon of said day, May 9th, 1904, he was handed

the plea in said case, with the following order, in the handwriting of the then judge of said court, at the bottom of the same: 'Ordered filed May 9th, 1904, Richard Hobbs, Judge C. C. A.,' which he filed in office on said 9th day of May, 1904; and that at the time said plea and order were filed the costs which had accrued in said case were not paid, and have not yet been paid; that the docket of said court shows said case first to have been marked 'in default, May Term, 1904,' and then the words 'in default' stricken out, and the words 'Plea filed, May Term 1904,' written on the docket, opposite said case, all in the handwriting of said Judge Hobbs, and that he did not know when said entries were made by Judge Hobbs on said docket." Upon this evidence the court sustained the motion to strike the plea, and the defendant excepta.

John D. Pope, for plaintiff in error.

Wooten & Hofmayer and *L. W. Nelson*, contra.

EVANS, J. (After stating the facts.) The evidence does not show that the case was in default. Before a case can be considered in default the appearance docket must be called and the entry "in default" must be entered. *Gordon v. Hudson*, 120 Ga. 698. While it appears that an entry was made by the presiding judge, "in default," it also appears that the same judge defaced the entry by passing his pen through it. Such mutilated entry should not have the effect of a judgment of "in default," and is rather attributable to an effort on the part of the judge to correct an entry inadvertently made. In calling the appearance docket it sometimes happens that the presiding judge enters a case "in default" by mistake, when a plea has been filed, and such erroneous entry is corrected by a total or partial defacement. It is rather to be presumed, from the evidence in the record, that the entry of the judge was due entirely to inadvertence, and not to an attempt to formally open an "in default" judgment. A default can not be opened except in the way prescribed by the statute. Civil Code, §§ 5070, 5072. There was no attempt to comply with the statutory requirement. The plea may have been filed with the judge, and at the time of the entry he may have forgotten the fact that he had it in his possession. The possibility of such an occurrence may explain the entry on the plea. At all events, a case is not "in de-

fault" unless so entered on the docket by the judge; and where the entry is marked off or defaced by the judge on the day the appearance docket is called, such marred entry should not have the effect of an "in default" judgment. The presumption is that the case was not in default, but that the entry was heedlessly made by the judge through mistake, and that he disfigured the entry with his pen in order to correct his mistake. We hold that it was error to strike the defendant's plea.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

FIELDS v. WILLIS.

C and F enter into a written contract whereby C agrees to sell to F a certain number of cattle at a stipulated price and is to receive a stated advance on the purchase-money, and C further agrees to pay a certain amount as liquidated damages in case he fails to comply with his agreement. After the signatures to the contract appears the following, "We, the undersigned, guarantee the fulfillment of the above contract," which is signed by W. The obligation of W, resting on no independent consideration, is that of surety.

Argued May 23, — Decided June 14, 1905.

Complaint. Before Judge Spence. Mitchell superior court. October 17, 1904.

Fields instituted suit, in the superior court of Mitchell county, against J. M. Cox, a resident of that county, and E. J. Willis, a resident of the county of Decatur. It was alleged in the petition that the plaintiff made and entered into a written contract with the defendants, a copy of which was attached to the petition, by which the plaintiff agreed to purchase from Cox certain cattle at named prices, according to the terms of the contract. The plaintiff alleged full compliance on his part with the contract, in the manner set out in the declaration, whereby the defendants became liable to him in the amount of damages stipulated, to wit, \$600. The following is a copy of the contract sued on:

"State of Georgia, County of Decatur. This agreement this day made and entered into by and between S. N. Fields, party of the first part, and J. M. Cox, party of the second part, witnesseth: That said party of the first part agrees on his part to purchase from the said party of the second part the following described

cattle, to wit: 150 two-year old steers at \$6.50 per head; 150 one-year old steers at \$5.50 per head; 150 two-year old heifers at \$6.50 per head; 150 one-year old heifers at \$5.50 per head. And all of said cattle to be good, straight, smooth, and merchantable, and to be of full age. All scrub stock will be rejected by the party of the first part. Said cattle to be branded thus: S-F on left hip. Bulls are not to exceed 25% in this contract and known as the S-stock ranging in Mitchell, Decatur, and Gadsden counties, State of Ga. and Fla., said cattle to be passed upon and graded in Bainbridge, Camilla, and Faceville, State of Ga., and this county. Said party of the second part agrees to sustain all loss on said cattle from death, escape, or otherwise, until they are graded and delivered as above. Said cattle are to be delivered on or before the 1st day of June, 1898, free on board cars as above agreed, and to be paid for at time of delivery. In order to secure and guarantee to party of the second part, and to make this contract more secure and binding on both parties, the party of the first part agrees to pay and advance as part payment the sum of \$600, the receipt of which is hereby acknowledged, which said sum of money, or any other sums of money so advanced or may hereafter be advanced, is part payment on said cattle; and now for the purpose of securing unto the party of the first part the aforesitipulated sums of money and the amount of fixed, liquidated, stipulated, and stated damages hereinafter mentioned, it is hereby expressly understood and agreed that said party of the first part shall have liens upon any and all of said cattle, and upon all of them that shall be purchased or now owned or held by party of the second part, and to enforce or foreclose said lien the said party of the first part is authorized and shall have the right, at any time after the above date of delivery, to take possession of any and all of the above-described cattle that may be so purchased or now owned or held by said party of the second part, wherever they may be found, and thereafter, within a reasonable time, to sell the same, either in the State or out of it, either at public or private sale, and apply the proceeds thereof to the payment of said sum of money so advanced, and said fixed, liquidated, stipulated, and stated damages hereinafter mentioned. And the said sum of money so advanced, as well as said fixed, liquidated, stipulated, and stated damages, are to be paid at Bain-

bridge, in Decatur County and State of Georgia; and all of said parties hereto further agreed that damages in this matter being uncertain and not capable of being understood and ascertained by any satisfactory known rule, the uncertainty being in the nature of the subject itself and the particular circumstances of the transaction and has been the subject of actual and fair calculation between the parties, it is agreed upon by all parties hereto that the sum of one dollar per head shall be the fixed, liquidated, stipulated, and stated damages herein and settled upon by the parties hereunto, and said sum to be paid by the parties hereto in default to the other upon the failure of the party in default to comply with this agreement in whole or in part. This is signed, sealed, and executed and delivered in duplicate, each party retaining a copy. Witness our hand and seals this 15th day of Apr., A. D. 1898.

"Attest, W. U. Fields.

S. N. Fields (Seal).

L. N. Cox.

J. M. Cox (Seal).

"We, the undersigned, guarantee the fulfillment of the above contract.

E. Willis."

"Witness, J. L. Thornton, N. P."

At the appearance term Willis demurred specially to the petition and asked that it be dismissed, upon the ground, that the court was without jurisdiction of his person; that if he was liable, he was liable, under the contract declared upon, as a guarantor, and not as a surety, and could only be sued in the county of his residence. The court sustained the demurrer and dismissed the petition, and the exception is to this judgment.

S. S. Bennet, for plaintiff. *A. H. Russell*, for defendant.

EVANS, J. (After stating the facts.) If the liability of Willis was that of a guarantor, the court did not err in dismissing the suit, because a guarantor must be sued in the county of his residence. *Geiser Mfg. Co. v. Jones*, 90 Ga. 307. If he was liable as a surety, then he was properly joined in the suit with the principal in the county of the latter's residence. In some respects contracts of suretyship and of guaranty are identical, and the terms "surety" and "guaranty" are oftentimes colloquially used as interchangeable expressions of collateral liability. A guarantor has the same right as a surety by written notice to compel

the institution of a suit against the principal. Civil Code, § 2974. The theoretical distinction between the two forms of contract is clear, but in the application of the principle the decisions of courts of last resort are in a state of inextricable confusion. While the liability of both is accessorial to the principal, in the case of a surety the obligation is primary, and the guarantor's liability is secondary. "A surety binds himself to perform if the principal does not, without regard to his ability to do so. His contract is equally absolute with that of his principal. They may be sued in the same action, and judgment may be entered up against both. A guarantor, on the other hand, does not contract that the principal will pay, but simply that he is able to do so; in other words, the guarantor warrants nothing but the solvency of the principal." *Manry v. Waxelbaum*, 108 Ga. 17. Ordinarily the surety joins in the contract with the principal; the guarantor engages in an independent undertaking. The former's liability is immediate and direct; the latter's arises upon the default or failure of his principal to perform his undertaking. Stern's Law of Suretyship, § 6. Our code draws the distinction between the contract of suretyship and that of guaranty, that the consideration of the latter is a benefit flowing to the guarantor. "The contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to the principal, the principal remaining bound therefor. It differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor." Civil Code, § 2966. No consideration is expressed in the postscript to the contract, which is relied on as creating the relation of principal and guarantor. Neither is there any allegation in the petition that there was a consideration flowing to Willis to make the contract. On the contrary, from the averments in the petition it is inferable that the contract of the principal and Willis was contemporaneously executed. The paper declared on does not indicate to the contrary. There is no date to the obligation of Fields, although the witnesses to the contract of Fields are not the same as those who attest the signature of Willis. No particular or formal phrase is required to create a contract of suretyship. Courts may disregard formal expressions, to ascertain the real intent of the parties, and the form of the contract is immaterial, provided the

fact of suretyship exists. Civil Code, § 2969. The mere use of the word "guarantee" will not make a contract one of guaranty. *Baldwin Fertilizer Company v. Carmichael*, 116 Ga. 763. "Guarantors, viewed in reference to the *consideration* of their contract, are either mere sureties or more than sureties. They are more than sureties when the consideration of the guaranty moves, not to them, but to the person for whose performance they become bound." *Wright v. Shorter*, 56 Ga. 76. Reading together the two contracts which appear to have been signed on a single piece of paper, it would seem that the purpose of Cox was to sell Fields a certain number of cattle of the specified grade upon stated terms, and, in default of delivery of the cattle pursuant to the contract, to become liable to Fields in stipulated damages. The extreme amount of damages which Fields would be entitled to recover, under the contract, was \$600, and this sum was advanced to Cox. The defendant Willis was aware that this sum was to be advanced to Cox, because it was so stipulated in the contract. Willis's liability was limited to this sum, and his undertaking was the evident inducement to Fields to enter into the contract with Cox. No other consideration is even suggested by the contracts, which induced Willis to sign, than the binding effect of the executory contract between Fields and Cox. No independent consideration flowed to Willis, but the consideration of his contract was the engagement between Cox and Fields. In the case of *Manry v. Waxelbaum*, supra, the consideration was one dollar paid to the guarantor. In another case (*Geiser Mfg. Co. v. Jones*, supra) the consideration of guaranty was alleged to be upon "a consideration not herein named." The liability in these cases was that of guaranty rather than one of surety, because not only was the guarantor's undertaking independent of the principal's contract, but it was supported by its own consideration, which flowed to the benefit of the guarantor.

It might be urged, from the definition of the contract of suretyship quoted from the code (supra), that the obligation of the surety is to pay the debt of the principal, and not to perform undertakings other than payments of indebtedness, and for that reason the liability of Willis is only that of a guarantor. This distinction can not be sound. In the case of a forthcoming bond the undertaking of the principal is to deliver the prop-

erty at a given time and place, and the liability to pay arises upon the default of the principal so to do; and yet one who signs a bond of this character with the principal is liable as surety and not as guarantor. The analogy between the illustration just used and the instrument under consideration is very close. Willis, by guaranteeing the fulfillment of the contract, simply acknowledges his liability to the obligee to pay the stipulated damages in case his principal fails to perform his contract. His liability for the stipulated damages, while dependent upon his principal's failure to perform the contract, is primary and joint with the principal for the payment of the stipulated damages resulting from a non-performance; and as the consideration moving Willis to sign the contract was not a benefit flowing to himself, but the making of an executory contract between his principal and the plaintiff, we conclude that his liability on the paper declared upon was that of a surety and not a guarantor.

That there might be no doubt as to the character of the action or the nature of the contract declared on, the plaintiff offered an amendment to his petition, alleging that the "signing of said Willis [was] contemporaneous with and a part of the making of said contract, there being no contract between the said Fields and the said Cox until the signing thereof by said Willis, and the said Willis signing the same really as surety for said Cox and as joint contractor with him, and became surety for said Cox and joint contractor with him, and without any consideration or benefit flowing to said Willis, and without any consideration except the credit extended to said Cox in said contract, it being the intention of all of said parties that said Willis should be such surety and joint contractor, and not a guarantor within the strict meaning of the term, irrespective of the words used therein; and if the words used in said contract import a different legal meaning, they were so used by mistake of all parties." This amendment in no way contradicted the terms of the writing, was germane to the cause of action set forth in the plaintiff's petition, and should, we think, have been allowed. Treating it as presenting the real truth with regard to the nature of the contract into which the parties entered, the conclusion is irresistible that the plaintiff had a right to hold

Willis liable as a surety, and that the suit should not have been dismissed as to him.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

STANSSELL *v.* MERCHANTS AND FARMERS BANK.

EVANS, J. 1. Though it does not appear, either from the transcript of the record or by a recital in the bill of exceptions, that a brief of the evidence had been approved by the court or had been agreed upon by counsel, this court will not dismiss the bill of exceptions; but it can not pass upon those assignments of error which depend for their determination upon the evidence; and if all the assignments of error are of this character, the judgment will be affirmed. *Fleming v. Roberts*, 114 Ga. 634; *Heard v. State*, 114 Ga. 90.

2. "Where there is no assignment of error upon a charge of the court save that the court erred in so charging, and the charge states a proposition of law which is in the abstract correct, this court will not consider whether the charge is applicable or appropriate in the case." *Brown v. Latham*, 115 Ga. 666.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 23,—Decided June 14, 1905.

Complaint. Before Judge Mitchell. Brooks superior court. December 9, 1904.

L. W. Branch, for plaintiff in error.

J. G. McCall, by *Z. D. Harrison*, contra.

WILLIAMS *v.* THE STATE.

EVANS, J. The only evidence introduced by the State which tended to show any motive on the part of the accused for the attempted arson was, that five days previously he "had some words that were unpleasant" with the wife of the owner of the house set on fire. Tracks, evidently made by a person who was barefooted, were discovered on the premises, and were traced to and from a point near the kitchen to the corner of the garden, some twenty yards away; thence across a public road to the sidewalk on the opposite side; along the sidewalk, which had a sandy surface, to the gate in front of the house of the accused, a distance of between fifteen and thirty yards; and from the gate to the steps of his house. The sidewalk led to a near-by village and was in use by the general public, there being no sidewalk on the other side of the road. There was nothing peculiar about these tracks, though they corresponded with tracks which the accused, on being charged with the crime, voluntarily made beside some

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Case 1	
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Case 1	
1129	497

of those in the road which were supposed to be his. While the testimony raised a suspicion as to his connection with the offense, it was not, in view of prior decisions by this court, sufficient to authorize his conviction. *Ross v. State*, 109 Ga. 516; *Cummings v. State*, 110 Ga. 293; *Green v. State*, 111 Ga. 139; *Patton v. State*, 117 Ga. 235; *Gaither v. State*, 119 Ga. 118.

Judgment reversed. All the Justices concur, except Simmons, C. J., and Candler, J., absent.

Argued May 15, — Decided June 15, 1906.

Indictment for attempt of arson. Before Judge Holden. Taliaferro superior court. April 8, 1904.

W. N. Maltbie, for plaintiff in error.

David W. Meadow, solicitor-general, contra.

MACON RAILWAY & LIGHT COMPANY v. STREYER.

1. The plaintiff's evidence as to the negligence of the defendant's employees and the observance of due care by herself and her husband and agent was sufficient to withstand a motion for a nonsuit.
2. In a suit for personal injuries, a charge that "if the evidence shows that [plaintiff's] own negligence caused the injury alleged, she could not recover, though you may believe from the evidence that she was injured and that the company was likewise negligent, provided you believe that the plaintiff's negligence . . . was greater than the negligence of the defendant company," is erroneous, in that it states in immediate connection with each other, without proper explanation, two distinct rules of law, qualifying the former by the latter.
3. The jury were authorized to infer that the plaintiff's injuries would be permanent, from the character of her suffering, and the length of time that it had continued up to the date of the trial; and hence it was not error to charge on the subject of permanent injuries. This is so though there was no direct and positive evidence that her injuries were in fact of a permanent character.
4. The verdict was not excessive, and the grounds of the motion not expressly dealt with in the foregoing show no cause for granting a new trial.

Argued April 11, — Decided June 15, 1906.

Action for damages. Before Judge Hodges. City court of Macon. December 19, 1904.

Dessau, Harris & Harris, for plaintiff in error.

Joseph H. Hall, contra.

CANDLER, J. Mrs. Streyer sued the Macon Railway and Light Company for damages on account of personal injuries, and obtained a verdict for \$1,000. The company moved for a new trial, which was denied, and it excepted.

123	379
124	900
123	279
125	300

123	279
128	631
123	279
129	210

1. From the evidence for the plaintiff it appeared that on the occasion under investigation Mrs. Streyer, the plaintiff, together with her husband and two children, were driving in a small delivery-wagon on a street in the city of Macon, along which a line of the defendant company ran. The plaintiff's husband was driving. The team was on a side of the street, clear of the car-tracks. At a designated point the plaintiff's husband, desiring to cross the street, started to drive diagonally across the tracks of the defendant. As he did so, he looked ahead, to see if a car was approaching in an opposite direction to the one in which he was going. Just as he did so, one of the children exclaimed: "Papa, watch out for the car!" He turned his head and saw a car approaching from behind. The motorman was looking towards the rear, and consequently could not see him. He motioned to the motorman with his hand, and also called him, at the same time endeavoring to drive off the track, so as to avoid a collision with the car. His efforts were futile, the car collided with the wagon, and the plaintiff received the injuries for which she sued. There was also evidence to the effect that at the time the plaintiff's husband attempted to cross the defendant's tracks, water was being discharged from a plug in the immediate vicinity; and the defendant contended that this caused the horse to become frightened and unmanageable, rendering it impossible to prevent the collision. The plaintiff's witnesses, however, denied that the gush of the water from the plug frightened the horse. At the conclusion of the evidence for the plaintiff, the defendant made a motion for a nonsuit; and it is argued that the plaintiff's own evidence showed that her husband, who was acting as her agent at the time, was guilty of negligence in not looking back to see if a car was approaching from the rear, and that had he exercised due diligence he would have seen the car and not have attempted to cross the track. The refusal of a nonsuit is here assigned as error.

Negligence is, except in certain well-defined cases, a question for the jury. Had the court below held as matter of law that the failure of the plaintiff or her husband to look behind them as they attempted to cross the tracks was negligence, it would have been error requiring the grant of a new trial. The facts were in evidence—it was for the jury to say whether or not they con-

stituted negligence. It was not error to refuse to grant a nonsuit.

2. The motion for a new trial complains of the following charge of the court: "Now the burden of proof is upon the plaintiff to show that she was injured, under the rules I have given you in charge, before any presumption arises; and if the evidence shows that her own negligence caused the injury alleged, she could not recover, though you may believe from the evidence that she was injured and that the company was likewise negligent, provided that you believe that the plaintiff's negligence, from a consideration of the evidence in the case, you believe that the plaintiff's negligence was greater than the negligence of the defendant company, its agents, servants, and employees." It will be seen that this charge states, in immediate connection with each other, two distinct propositions of law, viz., (1) that the plaintiff can not recover if her injuries were caused by her own negligence, and (2) the doctrine of comparative negligence. Following the decisions of this court in *Americus R. Co. v. Luckie*, 87 Ga. 6, and *Columbus R. Co. v. Peddy*, 120 Ga. 590 (4), the charge which we have quoted must be held error requiring the grant of a new trial. While we are compelled to so rule, we feel constrained to say that the charge of the court as a whole placed upon the plaintiff a burden greater than she should have been required to bear. We feel sure that all errors in the charge will be corrected by the trial judge upon the re-submission of this case to a jury.

3. The evidence as to the permanence of the plaintiff's injuries was by no means strong or convincing, but we can not say that it was erroneous for the trial judge to give to the jury instructions on the subject of damages for permanent injuries. It was in evidence that the plaintiff's injuries were received nearly a year before the case was tried, that she had suffered continuously since that time, and that her suffering had not ceased or abated. We know of no law which confines the jury to medical expert testimony in considering a case of this kind, nor can we conceive of any reason why they may not draw their own inferences as to the permanence of an injury from the length of time and the seriousness with which it has continued. The Carlisle tables were admitted in evidence without objection by counsel

for the defendant, and it was not error, under the circumstances, for the court to charge the jury as to their use.

4. The verdict was for one thousand dollars. In the light of the plaintiff's evidence as to the extent of her injuries, this amount can not be considered excessive. Of the grounds of the motion for a new trial which were not abandoned, those which have not been considered in the foregoing complain of extracts from the judge's charge, but they do not disclose error of such importance as to require the grant of a new trial. The judgment is reversed for the reasons stated in the second division of this opinion.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

JONES *et al.* v. McCRARY *et al.*

1. The writ of error will not be dismissed on the ground that it appears from the brief of evidence incorporated in the bill of exceptions that certain of the defendants in error are persons non compos mentis and were not represented by guardian ad litem or next friend, when it does not appear that the persons in question have ever been adjudged lunatics, and when they have appeared in the court below as defendants and secured the benefit of the ruling which it is sought to have this court review.
2. It will be presumed that an officer has not exceeded his authority, unless some showing to the contrary is made; and where the sheriff's return shows that he has personally served one of the defendants in error with a copy of the bill of exceptions, the writ of error will not be dismissed on the ground that the return does not show that the person in question resides in the county over which the sheriff's jurisdiction extends, there being nothing in the record to indicate that she resides elsewhere.
3. The assignments of error, while not scientifically drawn, are sufficient to withstand a motion to dismiss.
4. An applicant took a homestead in 1869 as the "head of a family," consisting of himself and eleven children—four sons and seven daughters. The applicant died in 1885, after all of the children had reached majority. Four of the daughters were living on the place with him at the time of his death, and have continued to live on it and support themselves out of its proceeds. *Held*, that the only claim of the four daughters as beneficiaries of the homestead was as dependent relatives of the applicant; and when he died, their dependence ceased and the homestead estate was at an end.

Argued April 13, — Decided June 15, 1905.

Application for partition. Before Judge Holden. Warren superior court. October 6, 1904.

L. D. McGregor and *R. H. Lewis*, for plaintiffs.

E. P. Davis, for defendants.

CANDLER, J. 1. On the call of this case in this court the defendants in error moved to dismiss the writ of error, on the grounds, (1, 2) that there was no proper assignment of error; (3) that it appears from the brief of evidence contained in the bill of exceptions that two of the defendants in error are persons non compos mentis, and are not represented by guardian or next friend, and were not properly served with a copy of the bill of exceptions; (4) that it does not appear from the entry of service that certain of the defendants in error were served with the judge's certificate or the writ of error; and (5) that it nowhere appears that one of the defendants in error resides in Warren county, where the suit was pending, or that the sheriff had authority to serve her officially. The assignments of error, it must be confessed, are subject to criticism, but after a careful examination of the entire bill of exceptions we think they are sufficient to withstand a motion to dismiss. It is true that it appears in the evidence that certain of the defendants in error are imbeciles; but it does not appear that they have ever been adjudged lunatics. Having appeared in the court below without the appointment of a guardian, and received the benefit of a judgment in their favor, they can not now set up their disability in order to prevent the plaintiffs in error from calling in question the correctness of that judgment. As to the service of the bill of exceptions, counsel for three of the defendants in error acknowledged service, while the sheriff's entry shows personal service on the remaining three. There is nothing on the face of the return to indicate that the service was defective in any way. In the absence of some showing to the contrary it will be presumed that the sheriff did not exceed his authority by serving a party over whom he had no jurisdiction. The motion to dismiss the writ of error is therefore overruled.

2. In 1869 Ezra McCrary, as the "head of a family," took a homestead in certain real and personal property, the realty consisting of 285 acres of land in Warren county. The record is silent as to whether he had a wife living at the time or not. There were eleven children—four sons and seven daughters,—most, if not all, of whom were of age when the homestead

was set apart. Two of the daughters were and still are imbeciles. They, with two other unmarried daughters of Ezra McCrary, live on the land embraced in the homestead, and are dependent upon it for a support. Ezra McCrary died in 1885, intestate, the plaintiffs and the defendants in the present case being his only heirs at law. This suit was a petition by some of the heirs at law to partition the real estate. At the conclusion of the evidence, the material portions of which have been substantially set out in the foregoing, the judge of the superior court directed a verdict for the defendants, "on the ground that the homestead estate has not yet terminated," and the plaintiffs excepted.

The question presented is not without considerable difficulty, for the reason that the decisions of this court construing the homestead law enacted in pursuance of the constitution of 1868 have been far from harmonious. That act did not provide, as does the present law, in express terms for an exemption for the benefit of dependent females. Its provisions extended only to "each head of a family, or guardian or trustee of a family of minor children." Code of 1873, § 2002. But in construing the meaning of the term "head of a family," this court in an early case decided that the word "family" was not to be confined to the wife and immediate descendants of the applicant, but included indigent female relatives who lived with the applicant and were dependent upon him for a support. See *Marsh v. Lazenby*, 41 Ga. 153, where it was held that an unmarried man, whose indigent mother and sisters live with him and are supported by him, is the head of a family in the sense in which the term is used by the constitution of 1868. Grandchildren have also been held to be members of the applicant's family within the meaning of the homestead laws. *Hall v. Matthews*, 68 Ga. 490; *Towns v. Mathews*, 91 Ga. 546. In direct conflict with these cases is the ruling in the case of *Dendy v. Gamble*, 64 Ga. 528, where it was held that to constitute one the head of a family within the meaning of the homestead clause of the constitution of 1868, there must be some legal obligation on him to support its members; but of course this case can not prevail as authority in the face of the earlier case of *Marsh v. Lazenby*, supra. Indeed, our court seems to have drawn a distinction, the

logic of which is not apparent to the writer, between different sorts of family to which the benefits of a homestead were allowed. Thus, as will have been seen, in *Marsh v. Lazenby*, a family consisting of the applicant's mother and indigent sisters was recognized. In *Heard v. Downer*, 47 Ga. 629, there is a strong, if not a necessary inference that adult children, though dependent upon the applicant, are not entitled to the benefits of a homestead; while in *Vornberg v. Owens*, 88 Ga. 237, it was held: "That one of the minor beneficiaries of a homestead taken by the head of a family in 1879 is, after arrival at full age, a dependent female, will not extend the duration of the homestead beyond the death of the head of the family and his widow, and beyond the arrival at majority of all the children." Citing *Neal v. Brockhan*, 87 Ga. 130. And see *Sutton v. Rosser*, 109 Ga. 207 (4). On the other hand, in *Torrance v. Boyd*, 63 Ga. 22, it was held that where a man procured a homestead under the constitution of 1868 as the head of a family, without stating the nature of his family or restricting his application to any particular members of it, indigent and dependent adult daughters were entitled to its benefits, and that the homestead estate did not expire upon the death of the wife and the arrival of the minors at majority. In this case, however, the head of the family was in life at the time the suit was brought. To reconcile these cases is by no means an easy task. It can only be done on the hypothesis that although the constitution provided merely for a homestead for the benefit of the "head of a family," a homestead could be procured for the benefit of a head of a family of minor children which would endure only while the children were minors, regardless of their dependence; and that another sort of homestead could be procured for the benefit of the head of a family of dependent female relatives, which did not terminate with the arrival at majority of minor children or grandchildren, but lasted during dependence. Giving to the homestead in the present case the most liberal interpretation, viz., that it was procured for the benefit of a family of dependent females, what is the limit of the homestead estate? Homesteads for the benefit of families of minors have uniformly been held to terminate with the arrival at majority of the beneficiaries; and by parity of reasoning, a homestead for the benefit of a family of dependent females must terminate when de-

pendence terminates. But dependence upon what—the property, or the applicant for the homestead? We confess that it seems more logical and consistent with former rulings of this court to hold that the dependence should be upon the property rather than the applicant. But the question has been positively answered in the case of *Towns v. Mathews*, 91 Ga. 549 (4), where it was said: “The general fact of dependency alone would not be sufficient to keep the homestead in existence, because it has to be a dependency upon some person in life entitled, because of such dependency, to take a homestead.” Tested by this rule, then, the homestead in the present case expired with the death of Ezra McCrary in 1885, and the court below erred in holding that it was still in existence. •

We were asked by counsel for the defendants in error to review the case of *Haynes v. Schaefer*, 96 Ga. 743, with a view to overruling that decision in case it should be found to conflict with the view of the law taken by counsel in his brief. That case rests squarely upon the decision in *Towns v. Mathews*, supra, which we were not asked to review. In *Towns v. Mathews*, the beneficiaries of the homestead were the wife and the minor granddaughter of the applicant. The granddaughter's claim upon the applicant did not grow out of the fact of her minority, as would have been the case with one of his children; for a man is under no legal obligation to support his grandchildren, though they be minors; but upon the fact that she was a dependent female relative who lived with him and was a part of his household. In *Haynes v. Schaefer*, the family consisted of the wife of the applicant and several children. Two daughters, one of whom was a minor at the time the homestead was set apart, and the other not, claimed the benefit of the homestead after the death of the applicant and after the youngest had come of age. Their claim was likewise that of dependence rather than minority, and consequently the case came within the rule of *Towns v. Mathews*. As no request was made to overrule the latter case, it will not be disturbed, and *Haynes v. Schaefer*, in view of the earlier ruling, could not have been decided otherwise than it was.

Judgment reversed. All the Justices concur except Simmons, C. J., absent.

SMITH *et al.* v. McWHORTER, executrix, *et al.*

123	287
126	237

123	287
127	175
127	770
128	276

1. In 1860 Sarah Finch conveyed to "John F. Smith for the use, benefit, and advantage, in trust for said Mary A. Smith, for life, exempt from the marital rights of said John F. Smith or any future husband, for her sole and separate use, and on her decease to such child or children, or representatives of child or children, born of the said John F. Smith and the said Mary A. Smith, as she may leave in life," certain described land, "to have and to hold the said tract or parcel of land to him, the said John F. Smith, in trust for the said Mary A. Smith and her children, as above specified, forever, free from the debts, liabilities, obligations, or control of her present or any future husband of the said Mary A. Smith." The trust created by this deed was for the life-estate only, and, under the operation of the married woman's act of 1866, became executed immediately upon the delivery of the deed, and the legal title to the life-estate vested in the life-tenant. The remainder created was a legal remainder.
2. The estate in remainder being a legal estate, the trustee did not represent the remaindermen; and the judge of the superior court had no jurisdiction, on the application of the trustee, in chambers, to authorize the sale of the interest of the remaindermen.
3. As the trustee did not represent the remaindermen, their right of action did not accrue until the death of the life-tenant, and the possession of the defendants was not adverse to the plaintiffs until they had their cause of action.
4. Mere knowledge of the illegal decretal order and of the sale thereunder will not estop the remaindermen from asserting their title, after the death of the life-tenant, against the grantees of the purchaser under the void order. Nor can the remaindermen be said to have ratified such void sale, unless, with knowledge of the facts, something was done by them to indicate their adoption and approval of the sale under the decree.

Argued April 13, — Decided June 15, 1905.

Complaint for land. Before Judge Holden. Oglethorpe superior court. October 18, 1904.

On September 2, 1869, Sarah Finch made to John F. Smith a deed to certain land in Oglethorpe county known as the "William Finch tract," the consideration expressed in the instrument being the natural love and affection which the grantor had for his wife, Mary A. Smith, and their children, as well as the sum of five dollars in hand paid by John F. Smith. By this conveyance Sarah Finch granted the premises described "unto the said John F. Smith, for the use, benefit, and advantage, in trust for said Mary A. Smith, for life, exempt from the marital rights of said John F. Smith or any future husband, . . . for her sole and separate use, and on her decease to such child or children, or representative of

child or children, born of the said John F. Smith and the said Mary A. Smith, as she may leave in life. . . . To have and to hold the said tract or parcel of land to him, the said John F. Smith, in trust for the said Mary A. Smith and her children, as above specified, forever, free from the debts, liabilities, obligations, or control of her present or any future husband of the said Mary A. Smith." On November 22, 1875, John F. Smith, as "trustee for his wife, Mary A. Smith, and children," presented a petition to the judge of the Northern circuit, praying leave to sell the lands of the trust estate and to reinvest the proceeds of the sale in a tract of land belonging to petitioner, which was represented to be a more suitable place to rear his children, and was then occupied by himself and family as a residence. Upon the following day, which was in vacation, the chancellor passed an order granting the prayer of the petition, on condition that a guardian ad litem thereby appointed to represent the minor children should assent in writing to such sale and reinvestment. The assent of the guardian ad litem was procured, and the trust property was brought to sale. J. H. McWhorter became the purchaser at the sale, and on February 24, 1876, John F. Smith, as trustee for his wife and children, made to him a deed which recited, as authority for its execution, the above-mentioned order of the chancellor. On December 20, 1876, J. H. McWhorter conveyed the property to Joseph McWhorter, who by will devised the land to certain persons therein named. At the time the trust deed was executed, Mary A. Smith was over twenty-one years of age. She died December 27, 1900, leaving five children surviving her. These children, on March 31, 1902, after the death of their father on February 24, 1901, brought an action to recover the land described in the trust deed, against J. H. McWhorter, the purchaser at the sale by the trustee, and certain persons claiming under him. The defendants in their answer set up the claim that the deed of trust from Sarah Finch to John F. Smith clothed him with the fee-simple title to the property thereby conveyed; that the order of the chancellor conferred upon him power to sell the property for the purposes of reinvestment; and that J. H. McWhorter acquired the legal title thereto as purchaser at the sale made by Smith, trustee. The defendants set up the further defense that if such sale was not valid and binding in the first

instance, it was subsequently ratified by the plaintiffs, who for more than twenty years enjoyed the proceeds of the sale, with full knowledge of the facts. To the answer filed by the defendants the plaintiffs demurred both generally and specially. Thereupon the defendants amended their answer by alleging, in support of their contention that the sale had been ratified by the plaintiffs, the following facts: Plaintiffs had actual knowledge of the occupancy by Joseph McWhorter of the land sued for, continuously from November 20, 1876, up to the time of bringing suit, plaintiffs having been born and having lived on the Finch tract and having removed therefrom at the time of the sale thereof to J. H. McWhorter on February 24, 1876, and having from time to time thereafter been the tenants of Joseph McWhorter and having seen him make improvements upon it, and also having heard their parents say he was in possession in pursuance of the sale by their father as trustee. While plaintiffs remained members of the family of their father they were supported from the tract of land which he had purchased with the proceeds of that sale, and derived a support therefrom after the death of their mother and up to the time of his death. They knew the property so occupied and enjoyed by them was purchased with funds arising from the sale by the trustee; yet they did not assert an adverse claim to the premises sued for or notify McWhorter that they had any interest therein, and, with full knowledge of all the facts, remained in possession of the substituted tract of land after the death of the life-tenant. The plaintiffs demurred to the answer as amended, but their demurrer was overruled. A trial was had on the merits and resulted in the direction of a verdict for the defendants. The plaintiffs except to various rulings made during the trial, as well as to the overruling of their demurrer and the direction of the verdict.

Samuel H. Sibley, for plaintiffs.

W. M. Howard and *Hamilton McWhorter*, for defendants.

EVANS, J. (After stating the facts.) 1. The rights of the parties in the present litigation very largely, if not entirely, depend on the construction of the deed from Sarah Finch to John F. Smith, trustee, executed on the 2d day of September, 1869. A copy of this deed appears in the statement of facts. At the

time the deed was made, Mary A. Smith, the life-tenant, was an adult. The practical question is, whether, by the terms of this deed, a trust estate was created for the life-tenant and the remaindermen, executory at least until the death of the life-tenant; or was the trust limited to the life-estate and executed by the "married woman's act" immediately on the signing and delivery of the trust deed? It is a general rule, upon which "the authorities all concur, that in creating a trust estate, the trustee, without words of inheritance—and in the case of wills with them,—takes only such quantity of estate as is necessary for the purposes of the trust." *East Rome Town Co. v. Cothran*, 81 Ga. 361. If there is no need of a trustee to protect and preserve the interests of those who are to take by way of remainder, the trust will be limited to the life-estate. As was pointed out in *Fleming v. Hughes*, 99 Ga. 448, before the code a trust was necessary to preserve a contingent remainder, because such a remainder might be defeated by the premature termination of the precedent estate; but since the code, as no particular estate is necessary to sustain a remainder, the defeat of the particular estate for any cause does not destroy the remainder. It is not, therefore, necessary to interpose a remainder to trustees to preserve a contingent remainder. Hence it has often been held, that a conveyance to a trustee in trust for one for life, and, after the death of the life-tenant, to such children as the life-tenant may leave living at the time of her death, created a trust only for the life-estate, and that the remainder was a legal and not an equitable estate. *Tillman v. Banks*, 116 Ga. 250, wherein the prior cases on this subject are collated. See, also, *Luquire v. Lee*, 121 Ga. 624; *Stiles v. Cummings*, 122 Ga. 635. A grantor may convey the title to the remainder estate to the trustee; and the trustee, in such cases, will hold the legal title to the remainder estate until the trust becomes executed. *Askew v. Patterson*, 53 Ga. 209; *Ford v. Cook*, 73 Ga. 215; *Knorr v. Raymond*, 73 Ga. 749; *Cushman v. Coleman*, 92 Ga. 772; *Moore v. Sinnott*, 117 Ga. 1010, s. c. 113 Ga. 908. Likewise a grantor, while not expressly conveying to the trustee the title to the remainder estate, may create a duty in the trustee with respect to the estate in remainder, so as to convert the legal estate into an equitable one and make the trust executory until the duty may be performed under the terms

of the trust. Thus, if the instrument creating the trust imposes upon the trustee the duty of making division among indeterminate remaindermen after the termination of a precedent life-estate, the trust is executory pending the existence of the life-estate. *Riggins v. Adair*, 105 Ga. 727; *Cushman v. Coleman*, 92 Ga. 772. Or, if the trustee is expressly empowered to act and manage the property for the life-tenant and for the infant or contingent remaindermen, the trust is executory until the life-estate is determined. *Johnson v. Cook*, 122 Ga. 524. Generally where the title is conveyed to a trustee in trust for a life-tenant, with a remainder over, where no express trust for those who are to take in remainder is created nor any duty imposed on the trustee with respect to the estate in remainder, such remainder is a legal and not an equitable estate. The mere fact that the remainder estate may be contingent does not necessarily convert it into an equitable estate. *Mitchell v. Turner*, 117 Ga. 959. The contingency of the remainder, however, is always an important factor in construing the character of the estate passing to the trustee, in the effort to arrive at the true intent of the grantor.

The cases of *Thomas v. Crawford*, 57 Ga. 211, and *Jennings v. Coleman*, 59 Ga. 718, are distinguishable from the case at bar. In both cases the issue presented for determination arose upon the levy of a fi. fa. upon the interest of the tenant for life, and a claim by the trustee. In the first case the bequest of the property was to the trustee, who was to pay over the rents, issues, and profits annually to the person who it was contended owned a life-estate. By the will the corpus of the estate was expressly devised to the trustee; he was to have possession of the land, was to manage it and pay the income annually to Howard, and upon Howard's death the trustee was to deliver possession to those entitled in remainder. The phraseology of the will clearly indicated that the testator intended that the trustee should represent the whole estate during the life of Mr. Howard, and that the trust was to be executory so long as he lived. In the latter case the property conveyed by the deed before the court was subjected to the same trusts, uses, and conditions as were contained in the will of the father-in-law of the grantor; and it was held that the deed, interpreted and construed with the will, created an executory trust. This case is controlled by its

own special facts, and the conclusion reached was the result of an attempt to give effect to the two instruments so as to effectuate the grantor's interest. Discarding all technicalities, the plain and manifest intent of the grantor in the deed before us was to create a trust for the life-estate only. No express trust was created for the remaindermen; no powers were conferred on the trustee, and no duty imposed for the benefit and protection of the remaindermen. The evident purpose of the grantor in conveying the title to the life-estate to a trustee was to protect the life-tenant against the marital rights of the husband. This deed was made shortly after the enactment of the "married woman's act of 1866," and at that time the emancipation of a married woman's property was hardly appreciated by the public. As to her separate estate the wife was then a feme sole, and the husband's marital right of reducing to possession the wife's property and in this way acquiring the title thereto no longer existed. Only the naked legal title to the life-estate passed to the trustee; the estate in remainder was a purely legal estate. As no trust at the date of this deed could be created for an adult married woman, the trust was executed on the delivery of the deed, and the complete title to the life-estate vested in Mary A. Smith. The trustee represented neither life-tenant nor remaindermen, and having no duty to perform, the trust was executed. *Tillman v. Banks*, supra.

2. The estate in remainder being a legal estate, the trustee did not represent the remaindermen, and the judge of the superior court had no jurisdiction in chambers, on the application of the trustee, to authorize the sale of the interest of the remaindermen. *Milledge v. Bryan*, 49 Ga. 397; *Knapp v. Harris*, 60 Ga. 398; *Rogers v. Pace*, 75 Ga. 436; *Pughsley v. Pughsley*, Id. 95; *Taylor v. Kemp*, 86 Ga. 181; *Fleming v. Hughes*, 99 Ga. 444. The order of sale being without authority of law, the sale thereunder was necessarily void.

3. This suit was instituted within two years of the death of Mrs. Smith, the life-tenant. As the trustee did not represent the remaindermen, their right of action did not accrue until the death of the life-tenant; and the possession of the defendants was not adverse to the plaintiffs until they had their cause of action. *Inquire v. Lee*, 121 Ga. 634.

4. The defendants further pleaded that if the title did not vest in the trustee by virtue of the deed from Finch to Smith, trustee, but vested in the life-tenant and the remaindermen, they and their predecessors in title had full and complete possession of the premises since the date of the deed from Smith, trustee, to J. H. McWhorter (February 24, 1876), with the knowledge and consent of the remaindermen, who after their maturity enjoyed the proceeds of the sale. We have already pointed out that the trustee was not invested with the title to the land under the Sarah Finch deed. Under this deed Mary A Smith took a life-estate and the plaintiffs the estate in remainder. The trustee's sale was absolutely void. Whether the life-tenant was estopped from denying the legality of that sale or had ratified it does not enter into the present controversy. She died without having disaffirmed it, and the litigation is between the grantees of the purchaser at that sale and the remaindermen, whose estate did not come into possession until after the life-tenant's death. The rule in such cases is that remaindermen who do not participate in the sale by the life-tenant are not bound to proceed against the purchaser or give him notice until the accrual of their title. *Parker v. Chambers*, 24 Ga. 518. Before an estoppel can be urged against the remaindermen, they must have done some act whereby they derived a benefit or prejudiced another. It is quite evident, from the allegations of the plea, that the purchaser at the sale relied upon the validity of the decree of sale and the deed executed by virtue of and conformably with the decree. It is not even hinted that the remaindermen acted in any way to induce the purchase. The plea discloses that the ages of the remaindermen at the date of the filing of the plea ranged from twenty-seven to thirty-five years. The plea was filed in the year 1902, and the sale occurred in 1876; so that the oldest of the plaintiffs was approximately nine years of age when the decree was entered. In a case where a trustee for two persons sells and conveys the whole property in fee, purporting to act as trustee for one only, and a part of the price or of the proceeds of the sale passes from the trustee to the beneficiary not named in the transaction, such beneficiary must refund the same to the purchaser, or to those holding under him as subsequent purchasers, before he will be allowed to recover the whole of his interest in

the trust estate so sold and conveyed. *Bazemore v. Davis*, 55 Ga. 504. Also, where a trustee for the life-tenant, who does not represent the remaindermen, sells and conveys the entire fee, and the remaindermen receive a part of the proceeds of the sale, they must refund the amount so received before they can recover the whole estate in remainder. *Luquire v. Lee*, 121 Ga. 636. In the case before us the life-tenant died in 1900, and suit was brought by the remaindermen fifteen months thereafter. Of course they can not hold the land conveyed to the trustee in exchange for the land conveyed by him, and also recover the land which the trustee conveyed. Their action in suing for this land so soon after the life-tenant's death amounts to a disaffirmance and repudiation of the sale by Smith, trustee, to McWhorter. It is familiar doctrine that to bind one by a ratification of an illegal or void act, it must be shown that he had full knowledge, at the time of the alleged ratification, of the facts which would make such act illegal and void; and the burden of proving ratification is upon the person asserting it. *DeVaughn v. McLeroy*, 82 Ga. 688 (4). The bare fact that the plaintiffs lived on the exchanged land as members of their father's family and were supported by their father from the proceeds thereof would not amount to ratification of the sale. Their father owed them a support during their minority, and the acceptance, after majority, of their father's bounty would not be a ratification of an illegal and unauthorized sale of their land. Neither would their brief occupancy of the exchanged land after the accrual of their right to sue ratify the illegal sale, unless something else was done by them to indicate their adoption and approval of the sale under the decree. Nothing of this kind was alleged in the plea, and the court should have stricken the same on demurrer.

Inasmuch as the trial judge held contrary to some of the principles of law herein enunciated, a new trial is ordered.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

GRAY v. WRIGHT.

CANDLER, J. 1. A consent decree will not be set aside because, "through accident and mistake," one of the consenting parties failed to introduce evidence which was in his possession and which might, if submitted on a trial, have resulted in the rendition of a decree different from the one which was taken by consent.

2. It is not error to refuse to entertain a petition to enjoin the cutting of timber on land which, by a decree to which the plaintiff consented, has been legally adjudged to be the property of the defendant.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted April 20, — Decided June 15, 1905.

Petition for injunction. Before Judge Fite. Murray superior court. January 21, 1905.

H. A. Langston and G. G. Glenn, for plaintiff.

RUMBLE *et al.*, receivers, etc., v. TYUS *et al.*

A bank was placed in the hands of a receiver. Pending the receivership proceeding the bank filed a motion alleging that it was solvent and able to pay all of its creditors, set forth a scheme under which it claimed that it could be reorganized to the advantage of its creditors, and prayed that its assets be surrendered to it for this purpose. Certain of its creditors and depositors agreed in writing to the alleged reorganization scheme, and pledged themselves to aid in securing a dismissal of the receivership proceeding. The motion was granted and the assets of the bank turned over to it, upon which it proceeded to do business under a different name but under the old charter. The scheme failed, and the bank again made an assignment. Upon the petition of some of its creditors it was again placed in the hands of a receiver. Its assets are not sufficient to pay all of its creditors. *Held*, that, under the facts appearing in the record, in the distribution of such assets depositors who were not parties to the agreement and the application for a surrender of the assets under the first receivership are entitled to priority over those who were.

Argued May 17, — Decided June 15, 1905.

Intervention. Before Judge Russell. Pike superior court. October 3, 1904.

The Barnesville Savings Bank, upon the petition of Rogers and others as creditors, was placed in the hands of a receiver. While this case was pending, the Savings Bank filed an application in the superior court, in which the following allegations were in substance made: Since the bank was placed in the hands of a

receiver the bank has become solvent and able to pay its debts. The bank has perfected plans for a reorganization and its capital stock has been subscribed for anew by solvent persons, and the bank will be reorganized under its present charter as soon as the receiver is discharged. A list of subscribers and the amounts of their subscriptions were set forth. As soon as the bank is reorganized, debts due it, amounting to \$69,000, will be paid to it. The depositors in the bank have agreed to take \$20,000 of the preferred stock of the Barnesville Manufacturing Company, a corporation which was a debtor to the bank in a large amount, as a credit on their respective deposits. Unless the bank is reorganized the debts due it above referred to will be lost. All of the depositors in the bank, except a few whose deposits amount to about \$6,000, have signed an agreement, by which they agree to accept preferred stock as above indicated as a credit on their deposits, and then to take ten per cent. of their deposits in cash, and the remainder in two equal payments. The bank tenders a bond in the sum of \$50,000, conditioned to pay the depositors the amount of their deposits in accordance with such agreement. The bank has arranged to discharge all other debts due other persons. It is to the best interests of all parties concerned that the receiver be discharged by the court and the bank turned over to its stockholders, so that it can be reorganized; for in this way the debts due the bank will be paid, a new capital stock will be paid in, and a bond in the sum of \$50,000 given for the protection of the depositors who are parties to the agreement; whereas if the reorganization is not allowed to take place, the creditors of the bank will probably not receive more than twenty cents on the dollar. The prayer was that the receiver be discharged and ordered to turn over to the bank and its stockholders all its assets and effects in his hands. The agreement referred to in the application was exhibited to the court. In it certain depositors, through their representatives, agreed to the reorganization scheme set forth in the application of the bank, and pledged their efforts to secure a dismissal of the receivership proceedings as well as of a similar proceeding against the Barnesville Manufacturing Company in the Federal court, upon condition that the bank would give bond as set forth in the application. Upon consideration of the application and agreement, the court passed an

order, reciting that, "after hearing evidence and argument upon the foregoing motion, and considering the agreement of the depositors and creditors of said bank," it is ordered, "upon consent of all parties, that the motion be sustained, the receiver discharged, the case dismissed, and the assets and effects of the bank surrendered to it." Thereafter the bank received its assets and effects, undertook to put in operation the scheme set forth in its motion, and proceeded to do business under the name of the Peoples Bank of Barnesville, the charter having been amended as to the corporate name. The charter was subsequently amended so as to change the liability of the stockholders. The scheme failed, the bank made an assignment, and a second application for receiver was made by certain of the creditors of the bank. In this proceeding W. G. Tyus and W. M. Rice & Son intervened and asked to be made parties. They alleged that they were depositors of the Barnesville Savings Bank, set forth the facts in reference to the management of the bank's affairs and the receivership above set forth, averred that they were not parties to the application for a surrender of the assets of the bank under the original receivership, that they were not among the creditors of the bank who consented to that scheme, that the receivers had in their possession sufficient assets of the bank to pay the intervenors' demands in full, and prayed that in the distribution of those assets they be allowed priority over those creditors who consented to the alleged scheme of reorganization. The receivers demurred to and answered the intervention. The court overruled the demurrer; and, the case having been submitted to the judge without the intervention of a jury, he granted an order requiring the receivers to pay in full the demands of the intervenors before payment was made to other creditors who were parties to the agreement above set forth. It appeared from the evidence, that the intervenors were not parties in any way to the scheme of the bank or to the motion under which its assets were surrendered to it, that the averment in the motion that the bank was solvent and able to pay its creditors was untrue, and that there was in the hands of the receivers a sufficient amount of the assets of the bank to pay the claims of the intervenors, though not enough to pay all the other creditors of the bank. The receivers excepted to the orders overruling the demurrer and

requiring them to pay the claims of the intervenors. The contest is between depositors of the bank who did not consent to the alleged reorganization scheme of the bank and creditors who were instrumental in securing an order releasing to the bank its assets.

W. W. Lambdin and J. F. Redding, for plaintiffs in error.

R. L. Berner, contra.

COBB, J. The assets of the Barnesville Savings Bank were placed in the hands of a receiver under an equitable petition filed by some of its creditors. A copy of the petition is not in the record, but it is to be inferred that it was an equitable petition in the nature of a creditor's bill, filed in behalf of all the creditors of the bank, and especially in behalf of depositors. While this case was pending and the receiver was proceeding to gather in the assets and wind up the affairs of the bank, it filed an application to the court, asking that its assets be returned to it, so that they might be used and appropriated in furtherance of a scheme to rehabilitate the bank, which is set forth in the motion. It was distinctly averred in the motion that there were depositors, whose claims aggregated \$6,000, who had not consented to the scheme proposed; and it was also stated in emphatic terms that at the time the motion was filed the bank was solvent. Upon this representation the court permitted the bank to take possession of its assets and use them for the purpose stated in the motion. It is inconceivable that the judge would have for a moment entertained the application except for the unequivocal statement that the bank was solvent; which could convey no other idea to the mind of any one to whom the representation was made than that the bank was able to meet all demands of every creditor, and was in a position where the rights of creditors would not at all be imperiled by the court releasing the assets from its custody. It is hardly necessary to state that under no circumstances would a judge of the superior court have granted such an application to embark the assets of an insolvent bank into the uncertain scheme set forth in the application, except for the positive statement that the bank was in a position where the rights of its creditors would not be imperiled if its assets were placed in its hands. It does not appear that the plaintiffs in the intervention were parties to the original receivership proceeding.

Even in a creditor's bill filed in behalf of all the creditors of an insolvent the suit is between the actual parties thereto, and the actual plaintiffs have control of the case and may dismiss it at any time, or the defendant may make satisfaction to them and compel a dismissal. *McDougald v. Dougherty*, 11 Ga. 570 (7, 8); *Stinson v. Williams*, 35 Ga. 172. Any one interested in such a suit, not a party thereto, must come in and be made a party, before it is necessary that he should be consulted as to a dismissal of the case; but when in such a case the extraordinary powers of the court have been invoked, the assets of the insolvent seized by the court, and as a result an equitable lien attaches to the property in the custody of the court in favor of every creditor who sees fit to come in before decree, or even under some circumstances after decree, and claim his portion of such fund, while the plaintiffs have power to retire as litigants and therefore dismiss the case so far as their rights are concerned, the question as to what shall be done with the assets in the hands of the receiver is one addressed to the sound discretion of the judge, who may, on his own motion, give the matter such direction as the principles of equity require, either by imposing conditions in behalf of those interested in the fund although not parties, or by holding possession of the fund for a reasonable time to allow others to come in and assert their rights. The judge evidently thought that the rights of all persons interested in the assets were fully protected, or, as said above, the order would never have been granted. The scheme of the bank was a failure. It now appears that the bank was not solvent, that it not only was not in a position where it could pay all the depositors, but was not even in a position where it could pay those depositors who consented to the use of the assets for the purpose of carrying out the scheme of rehabilitation. The failure of the scheme was followed by an assignment, and the assignment was followed by a second petition in the nature of a creditor's bill. What is left of the assets of the bank is again in the custody of a court of equity; and those depositors who did not consent to the scheme, which was allowed a trial simply because of the misinformation which the court had as to the condition of the bank, now come into court and ask that their rights be protected as against the bank

and those depositors who saw fit to enter into what now appears to have been a visionary scheme to place the bank upon a firm footing. Those who have appealed to the court of equity in the present proceeding are depositors who entered with the bank into the scheme proposed in the motion which resulted in the assets of the bank being restored to it. It would seem there could be no question that in equity those depositors who had refused to consent to the scheme were entitled at least to be placed in the position where they were before the assets of the bank were turned over to it. Certainly they have this equity against those for whose benefit the assets of the bank have been used, and this equity must be accorded by those persons before they will be entitled to any of the equitable remedies which they invoke.

But it may be said that it is impossible now to determine what amount would have been received by the non-assenting depositors under a final decree in the original case. This is undoubtedly true. But whose fault is it that the court can not now restore the status as it existed at the time the assets were released to the bank? It is certainly not the fault of the intervenors; for they have taken no part in the management of the bank's affairs, nor have they directly or indirectly caused any of them to be handled for their benefit. These assets, which are admitted to have been of large amount, have become commingled with other assets, and some have been entirely lost, though it is admitted that there is in the hands of the present receivers a sufficient amount of the original assets of the bank to more than discharge the claims of the intervenors. How much these intervenors would have received under a decree in the original case will never be known, but the reason that it can not be known is due entirely to the bank and those who consented for it to enter into the scheme above referred to. Loss must fall on some one. Shall it fall upon those who are not in any way responsible for the misleading statement which caused the judge to release the hold of the court upon the assets of the bank? Or shall it fall upon those who made the misleading statement and those who have consented that the bank should use the assets thus obtained for their benefit? It seems to us there can be but one answer to this question. The loss should fall upon those who sought

to benefit themselves by a proceeding which would never have been allowed but for the misleading statements; and this would be true even though they were not directly responsible for the statement and even though they might have believed that it was true, it being now demonstrated that it was not true, and the officers of the bank, through whose conduct they hoped to be benefited, could certainly have ascertained the exact truth before the statement was made to the court. The case is indeed peculiar and exceptional, but it seems to be one where those who have been guilty of wrong-doing should not be permitted to be heard in regard to equities which they might have against others in reference to the assets now in the hands of the receiver, until they have allowed whatever equity and good conscience would require should be accorded to those creditors interested in the fund of the insolvent bank who were not parties to the misleading statement upon which the court acted, nor responsible for the condition of affairs which has brought about a tolling of the fund resulting from an assignment and a second receivership. If the court had been allowed to administer the fund under the first receivership, all creditors would have been paid *pari passu* and each would have been compelled to receive his *pro rata* without a murmur; and if it could be ascertained what would have been that *pro rata*, it may be that all would still be required to receive it. But certainly the creditors who took no part in the application to have the funds released by the court or in the subsequent transactions should not be charged with any expenses or losses incident to the management of the bank under the scheme, or the assignment, or the second receivership; and as the inability of the court now to find out what was the true interest of these non-assenting creditors in reference to the fund is due to the fault of those who are now clamoring for equitable relief, they will be allowed whatever equitable relief they may be entitled to as against those who have wronged them, provided they are willing to do full equity under the circumstances to those whom they have wronged. Under all of the circumstances of the case the only proper judgment that could have been rendered was that which required these non-assenting creditors who are now complaining to be paid in full their demands, allowing the court to distribute the balance of the fund for the benefit of those who

were the victims of the unfortunate scheme which was made possible by a misrepresentation of a material fact at the time their representatives took charge of the assets of the bank.

The additional record which the judge caused to be transmitted to this court was necessary in order to put the court in full possession of the case in all of its details; and therefore the motion to tax the costs of this additional record against the defendant in error will not be granted.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

123 302
129 524

PINKSTON v. CEDAR HILL NURSERY & ORCHARD CO.

A person selling goods to the agent of an undisclosed principal who receives the benefit of the purchase may go directly upon the principal for the price of the goods; and where the consideration of a contract made with a husband who has general authority to manage a farm belonging to his wife reaches her as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required, to charge her.

Submitted May 19, — Decided June 15, 1905.

Complaint. Before Judge Littlejohn. Dooly superior court. October 19, 1904.

J. T. Harrison and S. T. Pinkston, for plaintiff in error.

T. T. James and Graham Forrester, contra.

FISH, P. J. Suit on an open account was brought, in the county court of Stewart county, by the Cedar Hill Nursery and Orchard Company, for the use of J. W. Shadow, against Mrs. Lula Pinkston, and judgment was rendered in favor of the plaintiff. The defendant sued out a certiorari to the superior court, but it was overruled, and she excepted. The account sued on was for \$30.70, the price of certain fruit trees, grape-vines, etc., which an agent of the plaintiff had sold to J. G. Pinkston, the husband of the defendant. She denied that she had ever had any dealings with the plaintiff in person or through any authorized agent, whereas the plaintiff contended she was liable as an undisclosed principal. The agent of the plaintiff testified substantially as follows: In his capacity as salesman he visited Mrs. Pinkston at her home and tried to sell her some roses, trees,

etc. She stated that she did not want to buy any, but said if he would call on her husband at his place of business, he would probably buy some trees, as she had heard her husband say he wanted to buy one hundred peach trees to replant his orchard. Witness got the order for the trees and vines from Pinkston, who gave witness to understand that he wanted to put them on his place near Lumpkin. The sale was made to Pinkston, on his individual account and credit, and not as agent for his wife. Mrs. Pinkston was not known in the transaction, nor was witness informed that the place to which Pinkston referred as his farm really belonged to his wife. The only other witness introduced was Pinkston. He stated that he bought the trees and vines for his own use and on his own account, and not as agent for his wife, but admitted that he "managed her lands as his judgment dictated, and planted them in such ways as he saw proper;" that the trees were planted on the lands of his wife, to which she made no objection; that the trees were an improvement of her place, and that she would get whatever benefit might accrue from them being planted on her lands." The defendant did not offer herself as a witness nor introduce any evidence, but moved for a nonsuit. The question is whether or not a finding that Pinkston really purchased the trees, etc., as agent for his wife, with the intention of planting them on her place, which he managed for her as he saw fit, was warranted by the evidence. The judge of the county court thought so; the judge of the superior court entertained the same opinion; and we are not prepared to hold to the contrary.

The mere fact that Mrs. Pinkston got the benefit of the purchase would not make her liable to the seller. *Hightower v. Walker*, 97 Ga. 748. Nor could she be held accountable unless her husband acted as her agent in the transaction (*Axson v. Belt*, 103 Ga. 578), nor even then, if the fact of agency was known to the seller, and the seller extended credit to her agent, not to her. Civil Code, § 3025; *Mitchell v. Printup*, 68 Ga. 675; *Miller v. Watt*, 70 Ga. 385. A seller may, however, go directly upon an undisclosed principal (Civil Code, § 3024), provided the principal receives the benefit of the contract made with his agent. *Miller v. Watt*, supra; *Mickleberry v. O'Neal*, 98 Ga. 42. Agency may be shown by evidence no stronger than that adduced on the trial

of the present case. "Where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her." *Akers v. Kirke*, 91 Ga. 598. That the husband conceals his right to act for her and leads the seller to believe he owns property belonging to her is an important fact to be considered. *Maddox v. Wilson*, Ibid. 40. The agent's insistence that it was his intention to buy on his own account and on his individual credit is by no means conclusive, when the use he makes of the purchase tends to negative such insistence. *Simpson v. Patapsco Guano Co.*, 99 Ga. 168. See *Lewis v. Equitable Mortgage Co.*, 94 Ga. 573. In the present case the county judge was authorized to find, from the evidence, that the husband led the agent of the plaintiff company to believe that he was the owner of the orchard which he wished to replant, and upon the faith of his ownership thereof credit was extended to the husband, the wife herself representing to the agent that her husband owned the orchard and desired to buy trees to plant therein, though in point of fact it belonged to her.

In the petition for certiorari, complaint is made that the court admitted testimony of the agent which contradicted the terms of the written contract evidencing the sale to Pinkston. As the county judge states in his answer that no such objection was offered to the testimony on the trial of the case before him, we can not undertake to deal with this complaint.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

ATLANTIC & BIRMINGHAM RAILWAY CO. v. ROBERTS.

The petition as amended authorized a recovery either upon proof of a special contract or upon a quantum meruit. The evidence authorized a recovery upon either theory, and no sufficient reason has been shown for reversing the judgment.

Submitted May 19, — Decided June 15, 1905.

Complaint. Before Judge Crisp. City court of Vienna. December 3, 1905.

J. L. Sweat and Crum & Jones, for plaintiff in error.

M. P. Hall and W. F. George, contra.

COBB, J. The plaintiff sued the railway company upon an account for goods sold and delivered, and by an amendment, which was allowed without objection, set up an express contract to pay for the goods at the sum named in the account. Such amendment also contained allegations which, as against a general demurrer, would be sufficient to authorize a recovery upon a quantum meruit. The defendant in its answer denied the special contract, and also the other material allegations in the amendment which were relied on for a recovery. The judge submitted both issues to the jury, who returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, assigning error upon the admission of certain evidence, and also upon an extract from the charge of the court. The motion was overruled, and the defendant excepted. The evidence rejected was a voucher or receipt signed by a person not a party to the case, from whom the railway company claimed to have purchased the goods described in the petition. There being nothing to connect this evidence with the transaction under investigation, it was not erroneous to reject the evidence. The charge complained of was simply an instruction that, under the allegations of the amendment, a recovery upon a quantum meruit was authorized. The evidence was sufficient to support the verdict, and we find no reason for reversing the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

THOMPSON *et al.* v. HALE *et al.*

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124	313
e124	315

1. A charitable or eleemosynary trust may be created by grant or legislative act. If by grant, the donor may appoint trustees and confer the power of appointment of their successors on the trustees or the beneficiaries.
2. The trustees of an unincorporated academy, in the absence of power conferred by grant, have no authority to perpetuate their succession by filling vacancies in the board.
3. The superior court has plenary power over trusts for educational purposes, and may fill vacancies in the trusteeship, where no provision has been made therefor either by grant or by legislative act.

Argued May 19, — Decided June 15, 1905.

Equitable petition. Before Judge Littlejohn. Lee superior court. November 11, 1904.

F. S. Hale and other patrons of the Smithville Academy, residents and taxpayers of the town of Smithville, brought their equitable petition against W. W. Thompson and others, to enjoin them from exercising any further authority as trustees of Smithville Academy, or from electing or contracting with teachers, and to dissolve the board of trustees and appoint a new board, by reason of the following facts: On May 16, 1863, M. J. Barrow conveyed to the trustees of Smithville Academy, and to the worshipful master and wardens of Austin Lodge F. and A. M., two acres of land therein described. The intention of the donor was to donate this land as a site for the academy and masonic lodge, and it was accepted by the trustees and the masons. The masons abandoned all interest in the same, and it is now used only for school purposes. No trustees of the Smithville Academy were named in said deed, and all the persons who held office as trustees at that time have died or removed from said town, and there are now no trustees to hold the title. The defendants illegally took possession of the property, styling themselves trustees, and employed teachers who were without experience and who were objectionable to a large number of the patrons of the school. The defendants refused to vacate their position as trustees or to hear any objection to their conduct in managing the school. A copy of the deed from Barrow to the trustees of Smithville Academy was attached to the petition and is as follows:

"State of Georgia, Lee County. This indenture made and entered into this the sixteenth day of May, in the year of our Lord eighteen hundred and sixty-three, between Moses J. Barrow, of Sumter county, State aforesaid, on the one part, and the trustees of Smithville Academy and their successors in office, also the Worshipful Master of Austin Lodge F. & A. M., F. H. Cheves, and the senior and junior wardens, William J. Tillman and James N. Jones, and their successors in office, of the other part, witnesseth, that the said Moses J. Barrow, for and in consideration of the good will he entertains for education and masonry, hath given, bequeathed, and let to the trustees of Smithville Academy, and to the Worshipful Master and Wardens of Austin Lodge F. & A. M., all that tract or parcel of land consisting of two acres, lying and being in the town of Smithville, county and

State aforesaid, known and distinguished as the east half of lots numbers 10 and 11 and the west half of lots 14 and 15; bounded on the north by Cotton Avenue street. To have and to hold unto the said Trustees and Master and Wardens the above-specified lands for the purpose herein set forth, also for a church, if ever built. The said Moses J. Barrow doth for himself, his heirs and assigns, the right and title warrant and defend unto said trustees and officers of Masonic Lodge, so long as a school, lodge, or church either is held; but should all cease, then said lands are to be reverted to said Moses J. Barrow, his heirs and assigns. In witness whereof the said Moses J. Barrow doth hereunto set his hand and affix his seal, the day and year above written.

M. J. Barrow (L. S.)."

"Signed, sealed, and delivered in the presence of

"O. C. Pope, J. M. Bond, W. H. Hammock, J. P."

The defendants answered, averring that they are the duly constituted board of trustees of said academy, are in possession of the property, and are managing its affairs. They admitted that they had collected considerable sums of money from various sources for the purpose of operating and maintaining the school, and averred that they had properly accounted for and applied the same. They further averred, that they are the regularly elected members of the board of trustees of Smithville Academy, having been elected according to the established method and custom of electing members of such board since it was constituted forty-one years ago, and that they are the successors of the original board; that they are acting within the scope of their authority and are properly discharging their duties as trustees. The issue formed by the petition and answer came before the judge of the superior court on a hearing for an interlocutory injunction, at which time the following evidence was introduced by the plaintiffs: The deed attached to the petition; the affidavit of E. A. Booker, who testified that when he became a member of the board of trustees of said academy he asked for the minutes and was told that there were none, and that only since he became a member of the board had any record been kept of their actings and doings, or itemized statement of the receipts and disbursements made to the board; G. W. Warwick, who testified that at the August session of the board he demanded a record of

the selection of members, and the secretary told him there was none. Respondents introduced the following evidence: T. S. Burton, who testified that he had held the office of secretary and treasurer of the board, and as secretary had kept a record of all the acts and doings of the board which he considered of sufficient importance; that the present board are the regularly elected trustees of the school and the successors of the original board of trustees of the academy; W. W. Thompson, who testified that he had been a resident of Smithville for twenty-three years and a member of the board of trustees of Smithville Academy for twenty years, during which time he had been chairman of the board; that vacancies on the board occasioned by resignation or death had been promptly filled by the board's electing a successor, according to the uniformly recognized and established custom which had prevailed since the original constitution of the board; O. L. Thompson, who testified that the board of trustees as now constituted had been duly elected as the successors of their predecessors, according to the established method of electing trustees; that he had been a resident of Smithville for the past twenty years. There was other evidence to the effect that the board had been in the actual possession and management of the school and its affairs for a number of years.

After hearing the evidence the court passed the following order: "First, that the deed of M. J. Barrow, set forth in the original petition, created a trust as therein set forth, and vested the title to the real estate therein described in the persons then exercising the office of trustees of the Smithville Academy, in so far as the said deed makes reference to the trustees of said academy; and it further appearing that all the members constituting said board of trustees have died or removed from said town of Smithville, and whose whereabouts are unknown, and as the donor, M. J. Barrow, failed to provide a mode of filling the vacancies in the trusteeship for said property, there now exists a trust without a trustee, and under the law it becomes the duty of the judge of the superior court, acting as chancellor, to appoint trustees to hold office until the further order of the chancellor. Second: therefore I hereby appoint the following named citizens of said town of Smithville as trustees of said Smithville Academy, to wit: W. W. Thompson, E. A. Booker, T. S. Burton, A. H.

Bass, J. R. Cochran, B. I. McKenney, and O. P. Brown, to hold charge of the property described in said deed, to protect and preserve the same, and to do and perform all the duties incident to said office. Third: it is further ordered and decreed that the defendants as a board of trustees be and they are hereby dissolved and directed to turn over all of the property belonging to the said Smithville Academy to the board of trustees in this order appointed." The defendants in their bill of exceptions allege that the order of the court is erroneous, (1) because there was no vacancy in the office of trustees for Smithville Academy, and therefore a court of equity had no jurisdiction of the subject-matter; (2) because by the deed from Barrow the title to the property, so far as the school was concerned, was conveyed to the trustees of the Smithville Academy and their successors in office, and that the defendants are the successors to the original board of trustees to whom the property was conveyed; (3) because, no method of electing successors to fill vacancies in the board having been pointed out in the deed, the trustees had the right to provide for their succession.

Lane & Maynard, for plaintiffs in error.

G. W. Warwick, contra.

EVANS, J. (After stating the facts.) 1-3. It is reasonable to assume that at the time of the execution of the deed from Barrow to the trustees of the Smithville Academy and to the officers of the masonic lodge, the Smithville Academy had a potential existence and its affairs were administered by a board of trustees. The grant, therefore, was to the board of trustees then existing and to their successors in office. Conceding that the deed did not create the trust, but merely put the legal title of the property conveyed into the trustees and their successors, it does not follow that the trustees possessed the power to fill vacancies occurring in their board. A trust of this character can not be created otherwise than by grant or by legislative authority. It can not be created by grant unless property is conveyed. The legislature has the power to incorporate an academy and to authorize certain persons to act as trustees, and the act of incorporation may further provide for the filling of vacancies in the board of trustees; the courts will take notice of such legislative acts. But as the Gen-

eral Assembly has not incorporated the Smithville Academy or empowered any board of trustees to manage it and take charge of its affairs, and as no grant is shown, it would seem that there is no lawful authority for the trustees to name their successors or to fill vacancies occurring within the board. If we should construe this deed as creating a trust, the trustees at the time of the execution of the deed had no power to fill vacancies, the deed conferring no such power of appointment. We therefore conclude that as the legal title to the property was vested in the trustees filling the office at the time of the delivery of the deed, no power of appointing successors having been provided thereby, and there being no legislative authority authorizing the control and management of the academy by the trustees, the burden was shifted upon the defendants to show the legality of their existence as a board of trustees with authority to manage the affairs of the school. This was not done. The evidence covered only a period extending back twenty or twenty-two years, during which time it had been the custom of the board to fill the vacancies. This is insufficient to show authority in the present trustees either to hold title under the donor's deed, or to manage the school affairs of that particular locality. The deed from Barrow was to the trustees of the Smithville Academy and their successors, and to certain officers of the Austin Lodge F. & A. M., and their successors, for the purpose of education and masonry, and also for a church, "if ever built." There was a provision in the deed that when the premises ceased to be used for church, school, or lodge purposes the land would revert to the grantor and his heirs. It is clear that the grantor intended that the persons holding the office of trustees of the academy, and the officers of the lodge should hold the property, not for their own individual benefit, but for school and masonic uses. The designation of the trustees by their official character is equivalent to naming them by their proper names. *Inglis v. Sailors Snug Harbor*, 3 Pet. 114. When the trustees died the title did not descend to their heirs; nor was there a reversion of the land to the grantor or his estate, so long as the premises are used for the purposes specified. The petition alleges that the masonic lodge had abandoned all interest they might claim under the deed, but the land is still used for school purposes. The case made is that of a charitable or ele-

mosynary trust without a trustee; and in such cases it is within the power of the superior court to nominate a trustee or trustees to hold the property for the uses declared in the donor's deed. Civil Code, §§ 4008, 4009; *Beall v. Fox*, 4 Ga. 404. The beneficiaries under the deed are not the trustees, but all the persons living in the locality of the school who might avail themselves of its educational advantages and opportunities. As the deed did not confer the power of appointment, and the original trustees are no longer in existence, the power of appointing trustees vests in the superior court exercising equitable jurisdiction. This power of appointment may be exercised by the chancellor upon the petition of the beneficiaries of the trust. Civil Code, §§ 3178, 3195, 3197, and 3199. The chancellor exercised this power in the present case, and, we think, properly so, under the facts as they appear in the record.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SWINDELL & COMPANY v. ALABAMA MIDLAND
RAILWAY COMPANY.

The evidence offered to establish the fact that the fire was communicated to the property of the plaintiff by the engine of the defendant was entirely circumstantial, but was of such a character as to authorize a finding that the fire was so communicated. If this fact were established, the law would raise a presumption that the defendant was negligent, and it was error to grant a nonsuit.

Argued May 20, — Decided June 15, 1905.

Action for damages. Before Judge Bower. City court of Bainbridge. September 6, 1904.

A. L. Townsend and A. H. Russell, for plaintiffs.

Kay, Bennet & Conyers and T. S. Hawes, for defendant.

COBB, J. When this case was here before (117 Ga. 883), it was said that the evidence disclosed a case very similar to that of *Southern Ry. Co. v. Pace*, 114 Ga. 712. In the latter case the evidence for the plaintiff was altogether circumstantial, but was sufficient to raise a presumption of negligence, though this presumption was completely rebutted by the testimony for the defendant. The evidence for the plaintiff in the present case

is substantially the same as it was before, and therefore did not authorize the grant of a nonsuit. There was evidence from which a jury could find that the fire was communicated to the plaintiff's property from the defendant's engine; and if this fact was established, the law would raise a presumption of negligence against the company. If upon another trial the evidence for the plaintiff and the defendant is in substance the same as it was when the case was before this court at the March term, 1903, the judge would be authorized to direct a verdict for the defendant. But even under the ruling then made, a nonsuit was improper.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

WESLOSKY *et al.* v. QUARTERMAN *et al.*

1. A petition by minority stockholders of an insolvent corporation which has been placed in the hands of a receiver, brought twenty-six months after his appointment, with a view to obtaining leave to institute proceedings against the directors of the corporation, of whom he was one, for the purpose of calling them to account for alleged misconduct in conducting its business, is not premature for the reason that the affairs of the corporation have not been wound up and the extent of the liability of the directors ascertained; nor are the petitioners chargeable with laches in not sooner presenting their petition.
2. The receiver not being himself competent to bring such a proceeding against himself and his fellow-directors, it was within the discretionary power of the court to permit the complaining minority stockholders to maintain the action in behalf of themselves and others similarly situated, joining the receiver and the corporation as parties defendant.
3. The petition filed in conformity to the order of court granting leave to institute suit was good as against a general demurrer; and this being so, a motion to vacate the order was properly refused, irrespective of the question whether the plaintiffs' pleadings were or were not open to objections which could and ought to have been raised by special demurrer.

Argued May 22, — Decided June 15, 1905.

Motion to vacate order. Before Judge Spence. Dougherty superior court. October 7, 1905.

On January 17, 1902, the directors of the Commercial Bank of Albany filed a petition in the superior court of Dougherty county, alleging that the institution was financially embarrassed and unable to meet its obligations, and praying for a receiver to

take charge of its assets and wind up its affairs. The court appointed one of the directors, Morris Weslosky, receiver, and he entered upon the discharge of his duty as such and took possession of the assets of the bank. Some twenty-six months thereafter, on March 15, 1904, pending the receivership, S. J. Quarterman and other stockholders of the bank presented to the court a petition in which they set up the following facts: Some time prior to the suspension of the bank its directors, in violation of the provisions of the Civil Code, § 1914, made large loans to the officers of the bank, without good security. Among the loans made was one to Carter & Woolfolk, a partnership composed of the president of the bank, who was also one of the members of its finance committee and a director of the bank, amounting to the sum of \$19,503.77; another loan of \$2,318.21 to this director individually, and one of \$5,851.89 to his wife; a loan of \$5,250 to the wife of the bank's president; a loan of \$1,579.04 to its cashier, who was a director and a member of the finance committee, and another of \$4,279.07 to an insolvent corporation the stock of which was mostly owned by him and another director; still another loan to Morris Weslosky, the vice-president, a director and a member of the finance committee, of \$1,000, and one of \$3,500 to him in the name of the Albany Grocery Company, under which name he conducted business; and yet another of \$3,500 to a partnership composed of his father and another of the bank's directors, as well as a loan of \$1,000 to a firm of which still another of the directors was a member. These loans amounted in the aggregate to more than 25 per cent. of the capital stock of the bank, and one of them to more than ten per cent. thereof, as did also another loan mentioned. Other loans were made to certain relatives of the officers and directors of the bank in violation of law, and also to numerous persons on scarcely any security, and sometimes without any security at all. Large overdrafts were also permitted, the greater part of which still remain uncollected. The affairs of the bank, as now ascertained, are such that it is probable the depositors and general creditors will be paid in full, but the stockholders will receive nothing, but will lose the entire value of their holdings. Gross misconduct and neglect in the management of the affairs of the bank was charged against its officers and directors, amounting

not only to a breach of the duty they owed to its stockholders, but to a violation of the penal laws of this State. It was alleged, that, as a result of such malfeasance and misfeasance, the directors were liable to account for the monies lost and diverted by their misconduct; that the court's receiver, Morris Weslosky, who had been vice-president of the bank, one of its directors and a member of its finance committee, was himself liable with his codirectors for the wrongs committed by them, and was not in a position either to sue himself or to prosecute with vigor against his fellow wrong-doers an action in behalf of the corporation; and that it was accordingly the right of the petitioners, in behalf of themselves and other stockholders at interest, to proceed against the directors and enforce against them the personal liability they had incurred to the corporation. Petitioners prayed that they be allowed to so proceed, any fund realized as a result of the action to be subject to the further order of the court.

The court granted an *ex parte* order permitting petitioners to institute an equitable proceeding against the directors of the bank, including its receiver, Weslosky, as prayed, and to join as a party thereto the corporation, either as a plaintiff or as a defendant, in order that it might become bound by the final decree. After the filing of the suit so authorized, Morris Weslosky and John Mock, who were duly made defendants, appeared before the court and presented a written motion to vacate the *ex parte* order above referred to, on the ground that it had been improvidently granted, in that petitioners were without right to legally or equitably maintain such an action. This motion was overruled, and movants excepted.

John D. Pope and Little & Battle, for plaintiffs in error.

Hall & Wimberly, Crosland & Jones, and I. J. Hofmayer, contra.

FISH, P. J. (After stating facts.) 1. Among the reasons assigned why the refusal of the court to sustain the motion was erroneous are: (1) that the suit authorized to be instituted is premature, as the affairs of the corporation are still being liquidated; there is no certainty that the shares of its capital stock will be depreciated, or, if so, that they will become depreciated in any particular amount; and (2) because the petitioning stockholders

have been guilty of laches in failing to institute their suit within a reasonable time. It would seem that the action, if prosecuted at all, should be commenced before the affairs of the bank are finally wound up. Petitioners distinctly allege that while depositors and general creditors will probably be paid in full, the available assets of the corporation will be insufficient to meet the claims of its stockholders, and they will practically lose the entire value of their holdings. If they be unduly apprehensive, and the assets prove sufficient to meet their claims, in whole or in part, the defendants will profit by their good fortune; and in no event will the defendants, if subjected to liability, be called upon to pay more than is sufficient to discharge the just demands of the petitioners. The court may be relied on to so frame its decree. As to the inconsistent charge of laches, we are of the opinion that the petitioners have moved in ample time to protect their rights. They are not chargeable with fault because they did not find out the alleged misconduct of the bank's governing officials before it was claimed to have been wrecked and placed by the directors in the hands of a receiver; and even though they might then have ascertained the true condition of affairs, it was not unreasonable to wait twenty-six months, at which time it became apparent that the assets of the bank would be insufficient to meet the demands of its stockholders. The status was in no way changed by the delay, and the defendants are not in a position to complain thereof.

2. Unfaithful officials of a corporation are primarily liable to it for their misconduct. But where they are in control and minority stockholders are unable to secure relief within the corporation, such stockholders may usually maintain an equitable proceeding and thus call the managing officials to account for fraud or acts which are ultra vires. 3 Cook, Corp. (5th ed.) § 735. To such a proceeding, the corporation is a necessary party defendant, in order that the result may bind it and bar any future action which it might bring for the same cause. *Bethune v. Wells*, 94 Ga. 486. Had not the bank been placed in the hands of a receiver, the right of petitioners to bring the present proceeding would not be open to question. It is insisted, however, that after a receiver for the corporation has been appointed, all actions must proceed in his name, as he represents not only the corpora-

tion, but all persons concerned in the due winding up of its affairs. Ordinarily it is undoubtedly true that the receiver is the proper party to bring suit against offending officials. But when, as in the present case, the receiver is himself charged with having been one of the officials guilty of the wrong-doing, an equitable proceeding may be maintained by the stockholders, the receiver and the corporation both being made parties to the action. 2 Morse, Banks & Banking (4th ed.), § 718, p. 1151; *Brinkenhoff v. Bostwick*, 88 N. Y. 52. And it is unnecessary to allege any demand made upon the receiver to sue, since he could not be permitted to sue himself nor would he be a proper person to prosecute a suit against his fellow wrong-doers. 3 Cook, Corp. (5th ed.) § 741, and note on page 1911, citing *Flynn v. Third Nat. Bank*, 122 Mich. 642. The receiver must, however, be made a party defendant, that he may be given an opportunity to defend the action. 3 Cook, Corp. § 738, pp. 1898-9. To allow such a proceeding does not bring about a multiplicity of suits, as contended; for some one must prosecute a suit against the corporation's unfaithful officials, in order to establish their liability and call upon them to account. Nor is there anything in the suggestion that the remedy of the complainants was to apply to the court to have another receiver appointed to take the place of Weslosky. To remove him from office on the ex parte application of the complainants would be manifestly unjust; whereas to inquire into the truth of the charges of misconduct brought against him, on which they base their right to sue, would involve a trial of the case made in their petition, as a preliminary step towards granting their prayer to be allowed to maintain an action against him and his fellow-directors. One trial of the controlling issue should suffice to settle it once and for all. Certainly it was within the discretion of the court to allow petitioners to maintain the action, notwithstanding the corporation had been placed in the hands of a receiver. *Stephens v. Augusta Telephone Co.*, 120 Ga. 1082, and cit. It does not appear that the court abused its discretion.

3. Another assignment of error upon the refusal of the court to vacate its order allowing suit to be instituted is, "Because the petition on which the order was issued does not allege fraud or the commission of any ultra vires acts on the part of the directors." In this connection the Civil Code, § 1860, is cited,

and plaintiffs in error insist that no ultra vires acts were shown, since the provisions of law the directors were charged with having violated did not apply to the Commercial Bank of Albany, but only to State banks which issue circulating notes, and that there is no charge against the directors of actual fraud. Of course, if the complaint of the stockholders were idle and obviously without merit, this would have afforded ground for refusing to grant them permission to bring their suit. But is it so? It is somewhat amplified in the petition they were allowed to file against the defendants below who sought to have the action stayed. In that petition the charge is made, that, a few weeks before the suspension of the bank, the directors declared a semi-annual dividend of three per cent. on the capital stock of the bank, which dividend was not taken from the net profits arising from the business, and which crippled the bank by withdrawing cash assets, and led petitioners and others to believe that the bank was in a sound and solvent condition. There are other allegations indicating that the conduct of the directors in making loans to themselves and relatives and endeavoring to conceal the true state of the bank's affairs was fraudulent. Clearly the petition was such as to withstand a general demurrer. The motion to vacate the order granting permission to sue can not be said to supply the place of a special demurrer to the petition filed. That motion in the most general terms alleges that "as matter of law, under the allegations of the petition [for leave to institute suit], no legal right existed in the plaintiffs to exhibit said petition against any of the defendants named therein, nor to institute any action, nor to recover any judgment or decree against the corporation nor any of its officers or directors; nor is it competent in law or equity to wind up the affairs of the bank nor to fix the rights of stockholders in the proceeding which the plaintiffs have instituted." The most the court below was called on to determine, in passing upon this motion, was: (1) Were the complainants proper parties to institute such a proceeding? (2) Did they set forth a cause of action? (3) Was it expedient to allow them to maintain the suit in behalf of themselves and other stockholders similarly situated? Accordingly, we can not undertake at this time to deal with the question whether or not the acts of the directors

complained of amounted to a violation of the banking laws of the State, nor to pass upon any other question which can and should be raised by special demurrer to the petition. Suffice it to say, the court below rightly held it was incumbent on the defendants to defend the proceeding in the usual and regular way, by demurrer or answer, or both.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

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ANDERSON, next friend, v. ALBANY AND NORTHERN
RAILWAY COMPANY.

The only evidence of service of the bill of exceptions being an entry of an officer to the effect that he had left a copy of the same at the most notorious place of abode of a named officer of the corporation which was the defendant in error, the writ of error must be dismissed for insufficient service of the bill of exceptions.

Argued May 23, — Decided June 15, 1905.

Motion to dismiss the writ of error.

Anderson sued the Albany and Northern Railway Company, and the court granted a nonsuit. The plaintiff excepted. A motion to dismiss the writ of error was made on the ground that the bill of exceptions had not been served in the manner prescribed by law. The only evidence of service was an entry upon the bill of exceptions, of which the following is a copy: "I have this day served the Albany and Northern Railway Company with a true copy of the within bill of exceptions, by leaving such copy at the most notorious place of abode of J. S. Crews, who is the agent, vice-president, and general manager of the said Albany and Northern Railroad Company at Albany, Ga. This November 11, 1904.

Wm. Godwin, Dpt. Shff."

Walters & Walters, for plaintiff.

Hooper & Dykes and *Pope & Bennet*, for defendant.

COBB, J. The code provides that within ten days after a bill of exceptions is signed and certified the party plaintiff therein shall serve a copy thereof upon the opposite party or his attorney. Where the opposite party is the State, or does not reside in the county where the bill of exceptions is sued out, and the same

can not be served personally upon the attorney, by reason of his absence from the county of his residence, service may be perfected by leaving a copy of the bill of exceptions at the residence of such defendant. Civil Code, § 5547. The express provision authorizing service by leaving a copy at the residence of the attorney in two instances only indicates that the legislative intent was that in other cases the service must be personal. In addition to this, at common law, service of writs was required to be personal; and therefore a statute providing for service should be construed to require personal service, unless the contrary intent plainly appears. A corporation may be served with process either by serving an agent personally, or by leaving the process at the public place of transacting the usual and ordinary business of the corporation. Civil Code, § 1899. Process against a corporation served by leaving the same at the most notorious place of abode of an agent or officer is not good service. *Stuart Lumber Company v. Perry*, 117 Ga. 888. The only service made in the present case being by leaving a copy of the bill of exceptions at the most notorious place of abode of an officer of the company, the writ of error must be dismissed for insufficient service of the bill of exceptions. *Bank of Southwestern Ga. v. Tillman*, 94 Ga. 731. The ruling by two Judges in *Montgomery v. Walker*, 41 Ga. 682 (4), in so far as it may conflict with anything now ruled, is disapproved. See, in this connection, *Wostenholmes v. State*, 71 Ga. 669.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent.

MAXWELL, by next friend, v. WILLIS, commissioner.

LUMPKIN, J. 1. What is known as the "alternative road law," contained in the Political Code, §§ 573-583, was not repealed by the act of 1896 (Acts 1896, p. 78). The alternative road law created by the act of 1891, and embodied in the sections referred to, goes into effect upon recommendation of the grand jury. The act of 1896, amended by the act of 1898 (Acts 1898, p. 110), provided for a road law to take effect on a vote of the people of the county. The one does not repeal the other; but the one or the other may take effect upon being adopted by the grand jury or by popular vote. The act of August 3, 1903 (Acts 1903, p. 103), is an amendment to the act of 1896, and affects the road law provided for in that act. It does not directly amend any section of Political Code. Therefore, in counties where the

alternative road law has been adopted as provided by the sections of the Political Code cited, each male citizen between the ages of sixteen and fifty years is subject to road duty, although in any county where the other alternative road law provided for by the act of 1896 and the amendments thereof has been adopted, each male inhabitant of such county between the ages of twenty-one and fifty years who is not physically or mentally disabled is made subject to road duty, and although the time of service and the amount of commutation tax is different from that under the other system. *McGinnis v. Ragsdale*, 116 Ga. 245; *Commissioners of Roads v. Burns*, 118 Ga. 112.

2. The amendment to the act of 1891 (Acts 1897, p. 20) does not affect the point now decided.
3. Decatur county is not within the provisions of the act of August 12, 1903 (Acts 1903, p. 108).

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 23, — Decided June 15, 1905.

Petition for injunction. Before Judge Spence. Decatur superior court. March 29, 1905.

Randolph B. Russell and *John R. Wilson*, for plaintiff.

Albert H. Russell, for defendant.

GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY *v.* PRITCHARD.

1. When a bill of exceptions purports to contain an extract from the record in the case, and the same is at variance with what is contained in the transcript of the record duly certified by the clerk, the latter will control as to what is the true record in the case.
2. A process issued by a named person as "clerk," who is clerk of the superior court, bearing test in the name of the judge of that court, and requiring the defendant to appear "at the next ——— court to be held" for a given county on a day when a regular term of the superior court of that county is required by law to be held, is a valid process of the superior court, and needs no amendment. This is true notwithstanding the person signing the process as "clerk" is also clerk of the county court of that county and that court has a regular term beginning on the day when the defendant is required to appear.

Argued May 23, — Decided June 15, 1905.

Motion to dismiss petition. Before Judge Mitchell. Berrien superior court. September 29, 1905.

Pritchard filed a petition against the Georgia Southern and Florida Railway Company, in the office of the clerk of the superior

court of Berrien county, on February 19, 1904. At the March term, 1904, the defendant made a motion to dismiss the petition, on the ground that no process had been issued by the clerk of that court. The motion was not heard at the March term, but was continued until the September term. The bill of exceptions recites that at the hearing during that term the defendant introduced a paper which purported to be a process attached to the petition, of which the following is a copy: "State of Georgia, Berrien County. To the sheriff of said county, or his deputies, greeting: William Pritchard vs. G. S. & F. Ry. Co. Complaint. The defendant, the G. S. & F. Ry. Co., [is] hereby required, personally or by attorney, to be and appear at the next County Court to be held in and for said county on the third Monday in March, 1904, next, then and there to answer plaintiff's demand in an action of complaint. Witness the Honorable Robert G. Mitchell, Judge of said Court, this the 19th day of February, 1904. [Signed] J. D. Lovett, Clerk." The defendant also introduced evidence showing that J. D. Lovett was the clerk of the superior court and also clerk of the county court. It further appeared that both courts had a regular term beginning on the third Monday in March of each year. The bill of exceptions specified, as the record to be transmitted, the motion to dismiss and the judgment of the court thereon. The clerk transmitted these portions of the record, and also transmitted a paper signed by counsel for the plaintiff and the judge of the superior court, which embodies a motion to insert the word "superior" before the word "court," so that the process when amended "will read to the superior court instead of to the court," and an order that the defendant be served with a copy of the amendment and of the order, together with a copy of the original petition and process, twenty days before the next term of the superior court, and that that term be considered the appearance term of the case. The defendant excepts to the allowance of the amendment and to the overruling of the motion to dismiss. When the case was called in this court counsel for the plaintiff filed a suggestion that the copy process set forth in the bill of exceptions was not correct, in that the process as issued by the clerk did not have the word "county" before the word "court." Under an order from this court the clerk transmitted a copy of the original proc-

ess, duly certified, which is as follows: "State of Georgia, Berrien County. William Pritchard vs. G. S. & F. Ry. Co. Complaint. To the sheriff of said county and his deputy, greeting: The defendant, G. S. & F. Ry. Co., is hereby required, personally or by attorney, to be and appear at the next ——— court, to be held in and for said county on the 3rd Monday in March next, then and there to answer the plaintiff's demand in an action of complaint. Witness the Honorable R. G. Mitchell, judge of said court, this 19th day of Feb., 1904. J. D. Lovett, Clerk."

John I. Hall, R. C. Jordan, and F. S. Harrell, for plaintiff in error. J. P. Knight, Bush & Bush, and T. S. Felder, contra.

COBB, J. 1. The clerk of a court of record is the custodian of its records and files, and the certificate of this officer as to what is contained in the record must always be looked to, in preference to any other evidence. As to matters occurring during the progress of the trial, which are not of record or of file in the office of the clerk, the judge's certificate will control. But when a bill of exceptions purports to set forth a copy of what is of record or of file, and the recitals therein are at variance with what is contained in the record duly certified by the clerk, the certificate of the clerk will be looked to rather than the recital in the bill of exceptions. See *Southern Ry. Co. v. Flemister*, 120 Ga. 526, and cit.

2. The copy certified by the clerk appears to be a process issued by one as "clerk" who is in fact clerk of the superior court, bears test in the name of the judge of that court, and requires the defendant to appear at the next ——— court to be held for a given county. The words "county court" do not appear at all in this copy; nor does the word "county" appear anywhere as a term descriptive of the court referred to. One upon whom such a process was served could not be misled. It was returnable at a time when a regular term of the superior court would begin. It was signed by a person as "clerk" who was the clerk of the superior court, and bore test in the name of the judge of that court, and no other court was mentioned or referred to therein. The next court to be held in that county on the day named could not have been understood by the defendant to be other than a court in which the clerk who signed the

process and the judge in whose name it bore test were officers. The fact that the clerk was also clerk of the county court could not mislead, when there was no requirement that the defendant appear at the county court and when the process bore test in the name of the judge of the superior court. It may be that the copy process which was used in preparing the bill of exceptions contained the word "county," but this does not appear from the record. What would be the result in the event this did appear we do not determine. The case of *Cochran v. Davis*, 20 Ga. 581, apparently rules that defects in the copy are immaterial if the original is correct; but a critical examination of this case will show that what is said therein on this subject is obiter. If the original process had been as set out in the bill of exceptions, the case of *Lowrey v. Railroad Company*, 83 Ga. 504, would have been in point.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

FLETCHER v. FLETCHER.

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128	375

1. It is not necessary for a plaintiff who alleges himself to be the true owner and in possession of a tract of land to attach an abstract of his title to an equitable petition to restrain a trespass by an insolvent trespasser.
2. A plaintiff in possession of land under claim of ownership, upon proof of such possession and without showing a complete title, may maintain against an insolvent wrong-doer an action to enjoin any interference with his possession.

Argued May 23, — Decided June 15, 1905.

Equitable petition. Before Judge Mitchell. Berrien superior court. September 22, 1904.

George H. Fletcher brought an equitable petition against Joe Fletcher, and a demurrer was filed by the defendant. The petition was amended, and, as amended, alleged substantially, that the petitioner was the true and lawful owner and in the possession of a certain described tract of land; that the defendant, unlawfully and without authority from petitioner, had entered upon the land and commenced cutting the sawmill timber thereon with the intention of cutting and carrying away all of the sawmill timber upon the described tract of land; that petitioner

claims title to the land and timber by virtue of a deed from James H. Fletcher to himself, dated January 9, 1902; that the defendant claims title to sixty-five acres of said described land by reason of a deed from J. P. and Tucker Mauldin; that J. P. and Tucker Mauldin claim title from J. L. Fletcher, who claims title from James H. Fletcher, petitioner's grantor; that the deed from James H. Fletcher to J. L. Fletcher was never delivered to J. L. Fletcher, but was by him fraudulently obtained from the wife of James H. Fletcher by false and fraudulent representations to her that his father, James H. Fletcher, had directed and requested that she deliver the deed to him; and that, relying upon this statement of J. L. Fletcher, Caroline Fletcher, wife of James H. and mother of J. L. Fletcher, delivered the deed to him; that James H. Fletcher never directed that the deed be delivered to J. L. Fletcher, and never ratified the delivery which was made by his wife; that on the day following the delivery of the deed to J. L. Fletcher, and as soon as he ascertained the fact, James H. Fletcher demanded of J. L. Fletcher the return of the deed, and was informed that J. L. Fletcher had sold a portion of the land described in the deed to J. P. and Tucker Mauldin, and had delivered the deed to them, whereupon James H. Fletcher demanded of the Mauldins a return of the deed and at the same time informed them that the deed had never been delivered by him to J. L. Fletcher; that the Mauldins returned the deed to James H. Fletcher, and it was destroyed by him. It was further alleged, that at the time of the return of the deed to James H. Fletcher and its destruction by him, J. L. Fletcher had not conveyed the land to the Mauldins, but that they had actual notice, at the time deed was made to them by J. L. Fletcher, that he had fraudulently procured possession of the deed from James H. Fletcher; that the defendant also had actual notice that J. L. Fletcher had never had title to the land at the time he, the defendant, purchased it from J. P. and Tucker Mauldin; that petitioner went into possession of the land immediately upon receiving his deed from James H. Fletcher, which deed was upon a fair and valuable consideration, and that he still is in possession of the same; that the title claimed by Joe Fletcher is a cloud upon petitioner's title; and that the defendant is insolvent. The prayer was, for the cancellation of the deeds from J. H. Fletcher

to J. L. Fletcher, from J. L. Fletcher to J. P. and Tucker Mauldin, and from J. P. and Tucker Mauldin to the defendant; and that the defendant be restrained from interfering with the timber on said land or with the plaintiff's possession. The demurrer was upon the ground that the allegations in the petition, taken together with the alleged abstract of title, failed to show that the plaintiff had sufficient title to the lands described in the petition to entitle him to the relief prayed. The demurrer was sustained, and the plaintiff excepts.

R. A. Hendricks and McDonald & Quincey, for plaintiff.

H. B. Peeples and L. Kennedy, for defendant.

EVANS, J. (After stating the facts.) 1. The petition was not good as a proceeding to cancel title to land, because the parties to the deeds sought to be cancelled were not parties to the petition. Neither was there any prayer for damages for the trespass actually committed. So the petition was solely a proceeding for injunction to restrain the defendant from cutting or removing the timber, or in anywise interfering with the plaintiff's possession. An action of trespass upon realty, brought to recover damages to the freehold, is not maintainable by one who is not in possession of the land, unless he shows himself to be the true owner thereof. *Whiddon v. Williams Lumber Company*, 98 Ga. 700. If the plaintiff is in possession of the land under a claim of ownership, upon proof of such possession, and without showing a complete title, he may maintain against a wrong-doer an action for a trespass upon the property committed while such possession existed. *McDonough v. Carter*, 98 Ga. 703. Where the plaintiff relies upon possession, he must have the actual physical possession of the property upon which the trespass was alleged to have been committed, to support his right to recover even as against a wrong-doer. *Ault v. Meager*, 112 Ga. 148. The petition is not a suit to recover damages to the freehold, but is solely to enjoin an interference with the plaintiff's possession by a trespasser. The allegations as to the manner in which the defendant claimed his right to the timber upon a part of the land described in the petition were evidently intended by the pleader to show that the defendant was a trespasser and that his title was fraudulent. If the defendant relied upon his conveyance from the Mauldins as authority to cut

the timber, and had knowledge at the time he purchased from the Mauldins how their title had been obtained, his status would in no wise be superior to that of his grantors. His grantors, the Mauldins, according to the allegations of the petition, knew, at the time they purchased and obtained their deed from J. L. Fletcher, that J. L. Fletcher had fraudulently possessed himself of a deed which had been executed, but never delivered, by plaintiff's grantor. So that the case made by the petition is that of a plaintiff who alleges himself to be in the actual possession of a tract of land under a deed and who is seeking to enjoin an interference with that possession by an insolvent trespasser. It is not necessary to show a perfect title to land to entitle a complainant to enter a court of equity and seek relief against an interference with his possession by an insolvent trespasser. A prima facie title is sufficient in the absence of a better outstanding title. *McArthur v. Matthewson*, 67 Ga. 134. The possession of land under a deed raises the presumption that the possession is rightful, and that the possessor has a prima facie title. The petition in this case should not have been dismissed on demurrer, but the plaintiff should have been given an opportunity to prove the facts alleged in his petition; and upon proof of the allegations therein contained, he would be entitled to a permanent injunction against the defendant, unless he showed a better title to the timber than that held by the plaintiff. Accordingly, it was error to sustain the demurrer on the ground that the plaintiff had not shown such right or title as would entitle him to the writ of injunction.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

FLETCHER v. FLETCHER.

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LUMPKIN, J. 1. The Civil Code, § 4927, provides for applying for an injunction against cutting timber, in certain cases and upon certain conditions therein stated, without the necessity for alleging or proving insolvency of the defendant or the irreparable nature of the damages which will result. But where this section is not relied on, and the plaintiff seeks to enjoin the commission of a trespass on the ground that the defendant is insolvent and the damages will be irreparable, the requirement of that section, that the plaintiff shall attach an abstract of his title, has no application.

2. Where the plaintiff seeks to enjoin a trespass on the ground that the defendant is insolvent and the damages will be irreparable, an allegation that he is the true and lawful owner of the land described in the petition is sufficient to withstand a demurrer.
3. Section 5002 of the Civil Code does not apply to such a case, it not being an action to recover land, but an equitable proceeding to enjoin a trespass.
4. In such an action, where the plaintiff did not affirmatively allege without qualification that he was the owner of the land described, or set up any possession thereof, but alleged merely that he was the only true and lawful owner and had a true and complete title to the land, "as will fully appear by reference to abstract of title hereto attached," and thereupon voluntarily attached such an abstract thus referred to and made a part of his pleading, and where it showed on its face that one of the muniments of title on which the plaintiff relied was a partitioning of land lying in one county by partitioners appointed by the superior court of another county, and there was nothing to show how the court acquired jurisdiction of such partitioning proceeding, the petition was demurrable. *Williamson v. White*, 101 Ga. 276 (3), 279.
5. The decision in *Yonn v. Pittman*, 82 Ga. 637, had reference to the abstract of title attached to a statutory action of complaint for land.
Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 23, — Decided June 15, 1905.

Equitable petition. Before Judge Mitchell. Berrien superior court. September 22, 1904.

R. A. Hendricks and McDonald & Quincey, for plaintiff.

H. B. Peeples and L. Kennedy, for defendant.

MATHEWS v. ROUNTREE, executor.

1. Not only heirs, legatees, and creditors of an estate, but also all other persons concerned in the legal administration of the assets thereof, including a cosurety of the decedent on a bond on which suit has been brought, may interpose a caveat to an application for a year's support.
2. Until final judgment be rendered in the trial court, no interlocutory ruling which would not have finally disposed of the case, if rendered in favor of the excepting party, can be brought under review in this court.

Argued May 23, — Decided June 15, 1905.

Application for year's support. Before Judge Mitchell. Brooks superior court. November 8, 1904.

L. W. Branch, for plaintiff.

J. W. Edmondson and W. H. Griffin, for defendant.

FISH, P. J. An application for a year's support was made to the court of ordinary of Brooks county by Mrs. Hannah Mathews. To the return of the appraisers, S. S. Rountree, in his capacity as executor of the estate of M. Brice, filed a caveat. The ordinary, upon the hearing of the issues presented by the caveat, made the return of the appraisers the judgment of the court, and the caveator thereupon entered an appeal to the superior court. When the case was called for a hearing in that court, he offered an amendment to his caveat, which was allowed over the objection of Mrs. Mathews. She then moved to dismiss the caveat, on the ground that the caveator was not "an heir at law, legatee, or creditor of the estate" of her deceased husband, S. M. Mathews, and therefore had no right to object to the allowance of the year's support. The court overruled this motion to dismiss, and, at the instance of the caveator, continued the hearing of the case until there should be a final judgment in a suit upon a bond which had been signed by S. M. Mathews and M. Brice as sureties, to which suit Mrs. Mathews, as the executrix of her deceased husband, and Rountree, as executor of Brice, were parties. The present bill of exceptions was sued out by Mrs. Mathews, who complains of the rulings adverse to her, and also of the action of the court in continuing the case.

1. The interest which Rountree, as executor, had in contesting the right of Mrs. Mathews to receive the allowance set apart to her as a year's support was that he had reason to apprehend that there might be a recovery on the bond signed by his testator as surety, in which event the estate of Mathews would also become liable, because of the obligation which he had assumed as a co-surety. The caveator alleged, that others who had become sureties on the bond were insolvent; that the amount claimed to be due on the bond was \$3,483.41; that in the event of a recovery on the bond, he would have to look to the estate of Mathews for contribution; and that the excessive allowance given to Mrs. Mathews for a year's support would render that estate insolvent. It is therefore apparent that the caveator had a very vital concern in the matter of fixing the amount of money or property to be set aside as a year's support. Our Civil Code, § 3467, provides that, upon the return of the appraisers, the ordinary shall publish notice and cite "all persons concerned" to show cause

why the year's support should not be granted, and if no objections be interposed, the application shall be granted as a matter of course. After the year's support is once set apart, no one is at liberty to go behind the judgment granting it, no matter what interest he may have in defeating the same. So we are very clearly of the opinion that it was the right of the caveator, as one of the "persons concerned" in the matter of granting the application of Mrs. Mathews for a year's support, to resist the application upon any ground which could properly be urged by any other person concerned as heir at law, legatee, creditor, or administrator.

The plaintiff in error calls attention to the fact that the Civil Code, §3394, which provides for giving notice of an application for letters of administration, declares that the ordinary shall issue citation to "all concerned;" and, in this connection, several decisions of this court construing this section of the code are cited and relied on as supporting the contention that the caveator had no right to object to the allowance of the year's support applied for. In the case of *Augusta R. Co. v. Peacock*, 56 Ga. 146 (2), it was remarked that before one could be heard to object to the appointment of an administrator, it was incumbent upon him to "show that he has an interest in the choice of administrator, either as heir or creditor; some interest on the part of the objector in the assets and their distribution must appear." The language used is not inconsistent with the idea that one having such an interest in an estate as Rountree, the caveator, shows could object to the appointment of an unsuitable administrator. All that was definitely ruled was, that the railroad, which had killed the person on whose estate Peacock had applied for letters of administration, could not be heard to object to his appointment simply because the company apprehended he might bring suit against it for the homicide of the person whom it had killed. In *Williams v. Williams*, 113 Ga. 1006, similar language was used, and the court held that one claiming the property sought to be administered could not object to the appointment of an administrator. It is evident that an administrator should be appointed in order to contest such a claim in behalf of the estate he represents. The only remaining case relied on is *Towner v. Griffin*, 115 Ga. 965, wherein it was ruled that "An application for

letters of administration, which fails to allege that the applicant is an heir at law of the decedent, or a creditor of the estate, or any other reason" entitling him to administer the estate, should be dismissed at the instance of persons interested in the estate as heirs at law. In a later case (not cited, by the way) this court expressly ruled that it was not necessary that one objecting to the appointment of an administrator should be either an heir or a creditor of the estate, provided he had some interest in having it properly administered or disposed of without administration. *Dierks v. Smith*, 119 Ga. 859. The objecting party was one who had acquired by purchase the interest of an heir in the estate, and the objection made that there was no necessity for administration was held to be one which he could urge.

2. Had the court sustained the motion to dismiss the caveat, the ruling made would have brought about a final disposition of the case; and this being so, it is the right of the plaintiff to have the judgment overruling the motion reviewed by this court, notwithstanding the case has not finally been disposed of in the court below. Civil Code, §5526. But this court is without jurisdiction to also pass upon the exception taken to the allowance of the amendment to the caveat (*Turner v. Camp*, 110 Ga. 631), or to deal with the complaint touching the continuance of the case (*Berryman v. Haden*, 112 Ga. 752), since such interlocutory rulings can not be brought under review till the trial court renders final judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SOUTH GEORGIA RAILWAY COMPANY v. RYALS.

1. In a suit brought in a county court against a railway company for the negligent killing of stock, where the declaration alleged in general terms "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employees," it was subject to a special demurrer on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; and, in the absence of amendment, the declaration should have been dismissed.
2. Where suit was brought for the negligent killing of stock by a railroad company, and the declaration failed to allege the ownership of such stock, it was subject to special demurrer on that ground.

3. If a declaration alleges with sufficient specification negligence on the part of the defendant and its agents or employees, and in what such negligence consisted and when it occurred, it is not necessary to set out the names of the particular agents or employees alleged to have committed it.
4. The practice and modes of procedure in the county court are similar to those in the superior court.

Argued May 23, — Decided June 15, 1905.

Action for damages. Before Judge Mitchell. Brooks superior court. December 9, 1904.

This case originated in the county court of Brooks county, and was appealed to the superior court. Ryals brought suit against the South Georgia Railway Company, alleging that the defendant had damaged him in the sum of \$70, besides interest, by killing certain cattle and a hog which were described in an account attached to the declaration. The only allegation of negligence was "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employees." The defendant demurred to the declaration generally, and also on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; that it failed to allege that the stock killed belonged to the plaintiff; that the petition was not arranged in orderly paragraphs, and that it failed to state any facts constituting negligence or to state what agents or employees of the defendant were negligent. The demurrer was overruled, a recovery was had by the plaintiff, a motion for new trial was overruled, and the defendant excepted. Among other assignments of error was one based on the overruling of the demurrer, to which ruling a bill of exceptions pendente lite has been duly filed.

L. W. Branch, for plaintiff in error. *S. S. Bennet*, contra.

LUMPKIN, J. (After stating the facts.) A general allegation in a declaration, that damage was done by the running of the locomotive and cars of a railroad company in a careless and negligent manner by its employees, is subject to special demurrer. In the absence of amendment, a declaration based on such an allegation should be dismissed. *Seaboard Air-Line Ry. v. Pierce*, 120 Ga. 230; *Macon, D. & S. R. Co. v. Stewart*, Id. 890; *Russell v. Central Ry. Co.*, 119 Ga. 705. As to a suit in a jus-

tice's court, see *Macon & Birmingham Ry. Co. v. Walton*, 121 Ga. 275. Section 2321 of the Civil Code, under which, upon proof of injury from the operation of its locomotives, cars, or other machinery, a presumption of negligence arises against the railroad company, states a rule of evidence, and does not dispense with proper pleadings. In a suit against a railroad for the killing of stock, a failure to allege ownership of the stock furnishes ground for special demurrer. *Georgia Railway & Electric Co. v. Knight*, 122 Ga. 290. If there is a sufficient allegation of negligence on the part of a railroad company in respect of time, place, and circumstance, it furnishes no ground for demurrer that the declaration does not give the name of the negligent agent or agents. *Pierce v. Seaboard Air-Line Ry.*, 122 Ga. 664.

The practice and modes of procedure in the county court are similar to those in the superior court. Civil Code, §§ 4198, 4204. The court having erred in overruling the demurrer, all that occurred subsequently to that ruling was nugatory and need not be considered. *Macon R. Co. v. Walton*, 121 Ga. 276.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

SWEAT v. HENDLEY *et al.*, and *vice versa*.

1. Where an equitable petition was filed, seeking specific performance of a parol contract to convey a tract of land, alleging possession and improvements made by the plaintiffs thereon, an amendment was properly allowed which alleged that the land included in the contract was inadvertently misdescribed in the original petition, and that instead of being the east half of a certain lot, containing 245 acres, more or less, it included the entire lot, containing 490 acres, more or less.
2. Where a husband and wife alleged that the defendant had contracted with them jointly to convey a certain lot of land, and that they had taken possession of it and placed permanent improvements upon it, and prayed that he be required to execute a deed to them, and the defendant denied the existence of such a contract, it was error for the court to charge that the wife claimed one half of the lot and the husband the other half, and to submit to the jury separately the rights of the two as to the respective halves.
3. This is true although there was some evidence indicating that the wife's claim against the defendant originated on account of services rendered to him, or on account of her interest in other lands, and that in connection with this claim the defendant agreed that if the husband would buy the tract of land in dispute and pay the expenses incident to the purchase, he would make them both a deed, and that the purchase was made, possession

taken, and improvements made accordingly, and although the defendant testified that the husband had no connection with the purchase of one half of the lot and only acted for him as a matter of accommodation in making inquiry as to the other, and although the defendant expressed a willingness to make a deed to the wife conveying a life-estate on account of her services or interest in the other tract of land.

Argued May 23, — Decided June 15, 1905.

Petition for specific performance. Before Judge Mitchell. Berrien superior court. January 6, 1905.

J. L. Hendley and his wife, Mrs. Julia Hendley, brought their equitable action jointly against J. W. Sweat, seeking to compel a specific performance of an alleged contract to make a conveyance of land to them. It was alleged that the wife had worked for Sweat, who was her brother, and that he promised to remunerate her, and asked if she would prefer money or land, to which she replied that she would prefer land; that this conversation occurred in the presence of the husband, and thereupon the defendant told the husband that if he would find a good place and make the purchase and pay all the expenses connected therewith, the defendant would take the timber for himself and make a deed to the land to both the husband and wife; that the purchase of the land involved in the controversy was made accordingly, and the defendant placed the plaintiffs in possession; that they had spent much time, work, and money in improving the land, placing buildings upon it and clearing up a part of it; that the defendant took the deed to himself in order that he might sell the timber, which he had done; and that the plaintiffs had since occupied the land and paid the taxes, but the defendant refused to make them a conveyance. They prayed that they be decreed to be the lawful owners of the land, and that the defendant be required by decree to make them a warranty deed in fee simple to it. As originally brought, the petition described the land in regard to which the contract was alleged to have been made as being the east half of lot No. 7 in the 10th district of Berrien county, containing 245 acres, more or less. The plaintiffs amended their petition, "in order to correct a defect inadvertently made therein," by alleging that the land which the defendant agreed to convey included all of lot No. 7, containing 490 acres, more or less, instead of one half thereof as originally al-

leged. This was objected to on the ground that it set up a new and distinct cause of action. The objection was overruled, and an exception pendente lite filed and recorded. In the main bill of exceptions error is assigned upon it.

The defendant denied the contract alleged by the plaintiffs, but alleged, that he had bought the land referred to in the petition and had allowed the plaintiffs to go into possession of it under him, with the expectation that at some future time he would give to Mrs. Henley, who was his sister, a deed conveying a life-estate in it, in order that she might have a good home as long as she lived; that he never contracted to make a warranty deed; that she had lived in the family first with her mother, and after the death of the latter with the defendant, and had worked, and the place had been bought by the joint efforts of all the family; that after her marriage he agreed to pay her \$100 for her interest in the place referred to, but it was understood that if he made her a deed conveying the place where she has since resided, for her life, he was not to pay her the \$100; that the improvements the plaintiffs had made were small, if any, and would not amount to the value of the place for rental while they occupied it.

The jury found that the defendant should execute to Mrs. Julia Hendley a warranty deed to the west half of the lot of land upon which she resided, and that the defendant should retain the east half of the lot in question. The plaintiffs and the defendant each moved for a new trial. Both motions were overruled. The defendant filed a bill of exceptions, and the plaintiffs file a cross-bill.

Alexander & Gary and W. H. Griffin, for Sweat.

R. A. Hendricks, contra.

LUMPKIN, J. (After stating the foregoing facts.) 1. In ejectment or complaint for land mere inaccuracies of description may be corrected by amendment, but the declaration can not be so amended as to sue for another tract or parcel of land, not included in the original suit. This would be to add a new and distinct cause of action. But the present action is not ejectment or complaint for land. It is an equitable proceeding to compel specific performance of a contract to convey land. It would not be competent to add by amendment another distinct

contract to convey other land, and to seek its enforcement in addition to or instead of the contract originally relied on. *Milburn v. Davis*, 92 Ga. 362. But if the original contract was misdescribed or erroneously set out, it could be corrected by amendment. The action would still be predicated on the same contract. It would still be an effort to compel specific performance of that contract. Mere correction of a misdescription of the terms of a contract or of the land covered by it would not be adding a new and distinct cause of action. The amendment was, therefore, properly allowed. Civil Code, §§ 5097, 5098; *City of Columbus v. Anglin*, 120 Ga. 785; *McDougald v. Williford*, 14 Ga. 665.

2, 3. The presiding judge charged, in effect, that the wife claimed one half of the lot for services rendered the defendant, or for her interest in other land, and that if this were true, and she went into possession under a promise of the defendant to make her a deed, and by her labor and expenditure of money had made valuable improvements, the jury should find in her favor as to that part of the property; also that the husband contended that he was entitled to have a deed from the defendant to the other half of the lot, and that if the contentions of this plaintiff on the subject were correct, the jury should find for him as to that half. From the verdict rendered it would seem that these charges exercised a strong influence upon the minds of the jury, since they found for the wife as to one half of the lot, and for the defendant as to the other half. All parties to the litigation are dissatisfied with the charge, on the ground that it did not correctly state the contentions of the parties, and with the verdict of the jury. All contend that the verdict should have been in favor of the plaintiffs jointly, or in favor of the defendant. We think that this combined attack upon the charge and the verdict must prevail. The plaintiffs sought to obtain specific performance of an alleged contract made between the defendant and them jointly. They desired to stand or fall on the right, asserted in their pleadings, to have the conveyance made to them jointly. The defendant did not set up any ground for separating the parties plaintiff, but denied flatly the contract on which their claim was predicated. His mere expression of willingness to convey a life-estate to his sister, not ac-

ceded to by the plaintiffs, did not serve as a basis for a verdict in her favor separately, finding that a conveyance in fee simple should be made to her as to one half of the land. There was nothing in the pleadings authorizing the charge stated above, or the verdict of the jury. See, on this subject, *Lake v. Hardee*, 57 Ga. 460 (4); *Rhodes v. Hart*, 51 Ga. 320 (3); 2 Story's Eq. Jur. (13th ed.) 934, § 770 (a).

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

BEDGOOD-HOWELL COMPANY v. MOORE.

- FISH, P. J. 1. "If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party." Civil Code, § 3702.
2. An intentional and fraudulent insertion of additional property in a chattel mortgage by the mortgagee renders the instrument void. *Bower v. Cole*, 74 Tex. 222; *Hollingsworth v. Holbrook*, 80 Iowa, 151.
3. "The materiality of an alteration is a question of law; the fact of an alteration is a question for the jury." Civil Code, § 3703. That the court, in one portion of its charge, leaves the materiality of an alleged alteration to the jury, is not cause for a new trial, when the alteration, if made, was unquestionably material, and the jury found that it was made.
4. Refusal of an oral request to charge is not cause for a new trial.
5. The verdict was authorized by the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent

Argued May 23, — Decided June 15, 1905.

Illegality. Before Judge Mitchell. Thomas superior court. January 11, 1905.

J. D. McKenzie, Roddenberry & Luke, and *Shipp & Kline*, for plaintiff in error. *W. H. Hammond*, contra.

HOSCH LUMBER COMPANY v. WEEKS.

1. Where several executors of a will have qualified, the joint act of all of them is necessary to execute a special trust created by the will.
2. Where one of several coexecutors executes a deed which depends for its validity upon the signature of all, the heirs of the estate will not be held to have acquiesced in his unauthorized act, where there is no evidence that actual notice of the execution of the deed was ever brought home to them and

the deed is not recorded until after the execution and record of a later deed by an administrator de bonis non of the estate.

8. A party who gives notice to his adversary that the depositions of a named witness will be taken at a given time and place is under no legal obligation to appear at the place and time stated and take the depositions. If the opposite party, after complying with the notice, desires the evidence of the witness for himself, he must on his own part give notice to his adversary as required by the law relating to the taking of depositions. He may not "cross-examine" a witness who has never been examined in chief, and introduce in evidence the depositions so taken.

Argued May 24, — Decided June 15, 1905.

Ejectment. Before Judge Mitchell. Colquitt superior court. January 9, 1905.

A. G. Powell, C. J. Haden, W. S. Humphreys, Y. L. Watson, and E. L. Bryan, for plaintiffs. Shipp & Kline, for defendant.

CANDLER, J. This was a common-law action of ejectment, brought to recover a lot of land in Colquitt county. Several demises were laid, as will hereafter more fully appear. The plaintiff and the defendant claimed under a common source of title, viz., the estate of James Davison, of Greene county, who held under a grant from the State, and who died in 1882, leaving a will in which it was provided that the testator's wild lands (which included the lot now in dispute) "be sold at such time and place as may be to the best interest of my estate, at the discretion of my executors and the ordinary of this (Greene) county." The testator's wife, Ella M. Davison, was made executrix, and W. F. Davant and W. A. Overton executors of the will. In 1884 Davant and Overton, by consent of the executrix, resigned as executors, and were duly discharged from their trust by the ordinary of Greene county. In 1894 Robert E. Davison filed a petition in the court of ordinary of Greene county, reciting that the duly nominated executors of the estate of James Davison were no longer qualified to act, and that the estate was not fully administered, and praying that he be appointed administrator de bonis non cum testamento annexo of the estate of James Davison. The petition was granted, and letters of administration issued to Robert E. Davison. In 1897, for the purpose of administering the estate of James Davison, and for distribution among the heirs of the estate, the administrator applied for and received from the ordinary of Greene county permission to

sell all the wild lands of the estate of James Davison at public or private sale, by tracts or as a whole, citation and notice having first been made and published; and on June 8, 1897, the lot in dispute, with others, was conveyed by the administrator to Charles J. Haden. This deed was recorded in the office of the clerk of the superior court of Colquitt county, on May 6, 1898. On April 6, 1903, the administrator made a deed in which it was recited that "the estate of James Davison, deceased, late of Greene county, Ga., has been fully administered, pursuant to the terms of the will of said deceased, James Davison, and all of the debts of said estate have been fully paid," and conveying to the devisees named in the will, four in number, "all the right, title, and interest in the real property of said estate that may yet remain in said estate," designating certain lots, including the one now in suit. In 1899 C. J. Haden conveyed the land in dispute to the Hosch Lumber Company, the plaintiff below, and in 1903 the devisees under the will of James Davison made a like conveyance to Haden. The foregoing is an outline of the claim of title set up by the plaintiff. The defendant introduced a quitclaim deed made by W. F. Davant (who, as will have been seen, was one of the executors of the will of James Davison) to J. B. Norman, dated March 7, 1882, and recorded September 12, 1898, covering the lot in dispute; and a warranty deed from Norman to the defendant, dated November 10, 1883, and recorded in 1899. The defendant also introduced in evidence, over the objection of counsel for the plaintiff, what purported to be the depositions of W. F. Davant, in which he testified, that he was executor of the will of James Davison, and had the entire management of the estate; that the other executor, Overton, and the executrix, Mrs. Ella M. Davison, gave the management of the estate entirely to him; that he executed and delivered the deed dated March 7, 1882, to James Davison, "as the virtually sole executor, and for the benefit of the estate;" that the transaction was bona fide, and done in the interest of the estate; that the other executor and the executrix did not sign the deed, because the entire matter was left to him; and that in making the deed he acted as sole executor by request of the other executor and the executrix. The defendant also introduced a certified copy of a petition to the court of ordinary of Greene county, by Davant,

Overton, and Mrs. Davison, executors of the estate of James Davison, reciting that it was to the interest of the estate, and in accordance with the will of their testator, that "all the wild and scattered lands belonging to said estate be sold," designating, among others, the lot in controversy, and praying for an order granting leave to sell such lands at private sale. In pursuance of this petition it was ordered "that such executors have leave to sell such wild lands at private sale, if they think it is to the interest of said James Davison's estate to sell the same." The quitclaim deed made by Davant to Norman, by virtue of this order, to which we have already referred, contained no recital of the authority under which it was executed, and was signed, "Wm. F. Davant, executor of James Davison, deceased." At the conclusion of the evidence, the court directed a verdict for the defendant, and the plaintiff excepted.

1. It will be seen that the plaintiff put in evidence without objection a chain of title apparently complete, originating in a grant from the State to James Davison. The defendant's title sprang from the same source, and the question arises, who has the better title? The parting of the ways came with the quitclaim deed by Davant to Norman in 1882. The decision of this case turns in large measure upon the construction of this deed; for if it conveyed title, the subsequent deed from the administrator de bonis non was nugatory, and the court was right in directing a verdict for the defendant; while if it did not pass title, the defendant must yield to the superior claim of the plaintiff. The deed from Davant to Norman was executed by virtue of a provision in the will of James Davison, that the wild lands of the testator's estate be sold at such time and place as might be to the interest of the estate, at the discretion of his executors (three in number) and the ordinary of Greene county. The vital question at issue is whether or not Davant, a single executor, had authority to execute a deed which would pass title, his coexecutors having qualified but failing to join with him in the deed. There seems to be no doubt that in ordinary acts of administration of an estate the act of one executor is the act of all, and is binding upon the estate. *Hall v. Carter*, 8 Ga. 388; *Wilkerson v. Wootten*, 28 Ga. 568; *Willson v. Whitfield*, 38 Ga. 270. The sale of the wild lands of the estate of James Davison, however,

was a special trust created by the will; and the concurrent discretion of the three executors and the ordinary of Greene county was required to execute it; and it is well settled that to execute a special trust all the executors must join. This distinction was clearly drawn in the Code of 1882, §2449, which was in force at the time the deed from Davant to Norman was executed, and is still the law of this State. See Civil Code, §3317, where it is provided that "if more than one [executor] qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing special trusts." See also *Willson v. Whitfield*, supra; 5 Enc. Dig. Ga. Rep. 845.

2. It is claimed, however, by counsel for the defendant, that the heirs of James Davison and those claiming under them are estopped by long acquiescence in the deed from Davant to Norman. A complete reply to this contention is that there is in the record no evidence whatever of actual notice to the heirs of the deed, while that instrument was not recorded until September 12, 1898, more than sixteen years after its execution, and several months after the record of the deed from Davison, administrator, to Haden. It was not shown that any part of the purchase-price received by Davant from Norman was paid to the heirs, or that they knew at any time that the conveyance had been made. It was not claimed that the defendant or his predecessors in title had acquired any prescriptive title to the land in controversy.

3. It was sought to show by the depositions of Davant that he had authority from the coexecutors to execute the deed to Norman and to manage the affairs of the estate generally. From the bill of exceptions it appears that there was no evidence that these depositions were taken upon notice; "that they were not accompanied by any notice to take the same, nor was there any service or evidence of service thereon; that they were not dated; neither was it shown that they were taken in any lawful manner or by any lawful authority, being unaccompanied by any caption or return. The deposition began in the following language: 'Hosch Lumber Co. vs. J. S. Weeks et al.; in the superior court of Colquitt county; Georgia, Greene county; deposition of W. F. Davant, being duly sworn on cross-examination by the defendant.' Then follows the deposition, signed by W. F. Davant;

and following the signature of W. F. Davant was the following: 'The foregoing depositions were taken before me as stated in the caption, and answers reduced to writing by me; and I certify that I am not interested in the cause nor of kin or counsel to either of the parties. George A. Merret, Commissioner.' There was attached an order from John C. Hart, judge of the superior court, appointing George A. Merret as a commissioner to take depositions in the county of Greene, and a statement of Merret that he accepted the appointment. There was no notice to take the deposition, and no evidence of any notice, nor any waiver thereof." It appeared further that counsel for the defendant "stated that he had been served with a notice by the plaintiff to take this witness's testimony, but that the plaintiff failed to attend at the hearing, and that the defendant proceeded to cross-examine the witness and to have his testimony taken." The depositions were admitted over the objections of the plaintiff, and this is assigned as error. Clearly the evidence was inadmissible. There was barely a semblance of compliance with the provisions of the Civil Code, §§ 5315, 5316, 5317, relating to the formal requisites of depositions to be used as evidence. The mere statement of counsel in the court-room can not supply the deficiency of these vital requisites. Conceding everything that he stated, the depositions were still inadmissible. They purported to have been the "cross-examination" of the witness Davant. A cross-examination where there has been no examination in chief is a paradox. If, after having been notified by the plaintiff that the depositions of the witness would be taken, and having complied with the notice, and the plaintiff having failed to put in an appearance at the time specified, the defendant desired the testimony of the witness in his own behalf, he should on his part have given the plaintiff notice that the witness would be examined as his witness. The plaintiff was under no legal obligation to examine the witness after having given notice that his depositions would be taken; and if he was to be examined as a witness for the other party, the plaintiff had the right to be notified, so as to be present and cross-examine him.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

HENDRICKS, executor, v. SOUTHERN RAILWAY CO.

1. An action for damages was brought against a railway company on the ground that a house located near the railroad track was set on fire by sparks negligently emitted from an engine pulling one of the defendant's trains. A verdict was rendered in favor of the plaintiff, and on motion a new trial granted. On a second trial a verdict was again rendered for the plaintiff, for a slightly smaller sum. A second motion for new trial was made, and, upon the hearing before a different judge from the one who presided at the trial, it was granted. The motion contains no grounds assigning error in rulings of the court which would authorize a new trial, and the evidence was sufficient to sustain the verdict. *Held*, that the verdict should have been allowed to stand, and the grant of a second new trial was error.
2. The will of a married woman named her husband as executor, "with full and ample power to take charge of her entire property, personal and real, to manage it as in his discretion seemed best to him, to sell and convey and reinvest the proceeds of any sale made in both personalty and realty as he deemed best; and all sales of both personal and real property to be solely in the discretion of her said executor at private or public sale, or in such manner and on such terms as he saw fit to adopt relative to any and all her property, without any order from the court of ordinary for such sale or reinvestment; that her said executor was to be left, in the management of her said estate, to his own discretion, and should not be compelled to make returns of his acts and doings in the premises, she reposing entire confidence in his judgment and discretion to manage the property for the best interest of his and her children, without any interference by the court or orders and directions therefrom; she therefore gave him [power] to manage without restrictions all her said property, leaving it with him when and where to divide it out among their children, or to keep it together as long as he lived, or until the youngest child became of age, before any division thereof; or to make provision earlier or at any time that he saw fit and in the manner that he thought best; that her said executor should not be made to account for the management or disposition of her property or the proceeds thereof, but should have absolute and untrammelled control of her entire estate during his life without liability therefor; and at his death the estate then in his hands should be divided equally between his children, share and share alike; but should the said executor make any advances to any child during his or her life as part of his or her said child's distributive share in the estate of testator, then such advances so made shall be accounted for by such child in the distribution among the children of testator." *Held*, that this provision did not vest the legal estate at once in the husband individually. The executor had the right to keep the estate intact and manage it at least until the youngest child became of age; and for the negligent destruction of property forming a part of such estate during that time he could sue as executor.
3. On the trial of an action based on the contention that property was negligently set on fire by sparks emitted by a railroad engine, it being in controversy whether the engine was properly equipped and handled, evidence tending to show that on that day, and near the time of the alleged burning,

the same engine threw out sparks and cinders which set fire to grass along the right of way of the railroad at two different points, was admissible.

Argued May 25, — Decided June 15, 1905.

Action for damages. Before Judge Roberts. Pulaski superior court. December 27, 1904.

W. L. & Warren Grice, for plaintiff.

DeLacy & Bishop, for defendant.

LUMPKIN, J. T. R. Hendricks, as executor of his deceased wife, brought suit against the Southern Railway Company, to recover damages for the burning of a house and contents located near the right of way of the railway, and which it was alleged were set on fire by sparks or cinders carelessly thrown from one of its engines. The defendant denied the allegations of the declaration that the fire was caused by its engine, and that there was negligence on its part. Two verdicts were found in favor of the plaintiff. A second motion for new trial was made, containing fourteen grounds. But we think that none of them authorized the verdict to be set aside.

Among these grounds was one complaining that the court held, that, under the will of Mrs. Hendricks, the substance of which is set out in the second headnote, the executor had the right to keep the estate intact until the youngest child became of age; and that the executor consequently had the right to sue for an injury to the property resulting from a negligent tort. In this we think he was right.

There was conflict in the evidence as to whether the fire was the result of sparks or cinders thrown off by the defendant's engine. A witness testified that when the engine which it is claimed emitted sparks passed a place about four and a half miles from the place of the burning, it was throwing out sparks which set fire to the grass along the right of way. Another witness testified to a similar state of facts at a place about five miles from the point where the plaintiff's house was burned. The latter witness stated that he saw grass on fire about seventy-five or eighty feet from the railroad, and that it began to burn as soon as the train passed. A third witness testified that the engine emitted cinders and sparks as large as a man's thumb, and in considerable quantities; that they remained red hot until they fell to the ground and fired the grass along the right of way.

Evidence was introduced on behalf of the defendant to show that the engine was properly equipped with a spark-arrester which was in good condition. Its boiler inspector testified that the meshes or holes in the netting on this locomotive were three sixteenths of an inch in size; that if smaller holes were used it would clog the engine and prevent the necessary draft; and that if the netting was all right, nothing larger could pass through. On cross-examination he testified that a spark larger than a pencil could not pass through the spark-arrester, and that "if an engine had thrown out sparks larger than that cedar pencil and thrown them from sixty to eighty feet, and they stayed alive until they got on the ground, such an engine could not have been equipped with a first-class spark-arrester." The plaintiff did not, therefore, rely upon a mere presumption arising from proof of injury, but introduced additional evidence bearing on the question of negligence. It was not only admissible; it was very material. A careful examination of the record discloses no reason why this second verdict should have been set aside. See *Brown v. Benson*, 101 Ga. 753; *Central Ry. Co. v. Trammell*, 114 Ga. 312.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Evans, J., disqualified.

CALLAWAY v. IRVIN, administrator.

123	344
126	731
123	344
p127	242
p127	245
p127	769
128	686
123	344
129	242
130	765

1. Where land belonging to the estate of a decedent is actually admeasured by commissioners appointed to set apart dower to his widow, and she enters into possession of the same with the acquiescence of all persons concerned, it is not essential to the creation of a dower estate therein that there should be an order of court formally assigning the land to her as dower. It follows that the right to enjoy the reversionary interest in the land is postponed until the termination of the dower estate by her death, and prescription will not run against persons entitled to the reversion until their right of enjoyment accrues.
2. Where the record of a legal proceeding shows on its face that an order passed in vacation by the judge of the superior court is void for want of jurisdiction over the subject-matter, such order may be collaterally attacked at any time by any person who has not by his conduct estopped himself from questioning its validity.
3. Under the act of March 17, 1866, declaring under what circumstances a judge of the superior court may in vacation give direction in a case where it appears that it has become impossible to carry out the provisions of a

will, jurisdiction of the subject-matter depends upon the consent in writing of all persons at interest, who are *sui juris*, that the judge may render a decree. If a feme covert be a beneficiary under a will probated prior to the married woman's act of 1866, and her husband has taken no steps to enforce his marital rights with respect to the devise or bequest made to her by the testator, her written consent that the judge may entertain jurisdiction of a petition for direction presented by the executor is essential to the validity of an order passed in vacation, authorizing the executor to sell the property of the estate.

4. Estoppel by judgment can not be successfully urged as a defense to a suit brought by a single plaintiff, where it appears that in a former suit jointly instituted by him and others with respect to the same matter the defendant interposed several distinct defenses, some going to the merits of the controversy and one to the right to maintain the action as brought, and it does not appear upon which of these defenses the judgment in his favor was rendered.

Argued April 14,—Decided June 16, 1905.

Complaint for land. Before Judge Holden. Wilkes superior court. November 8, 1904.

On August 25, 1861, Seaborn Callaway died, leaving a will which contained the following provisions: "Item 2. I wish all my property kept together and used as I have used the same during the life of my wife, she to have the privilege, with the consent of my executors, of giving off to my children, as they become of age or marry, such parts as she and they may select, to be accounted for in the final division, as shall be also what I have given heretofore to any of my children. Item 3. At the death of my wife, I wish my property equally divided between my children. . . Item 5. If any of my children die without leaving children, I wish the share given to them by this will to revert to my other children. . . Item 7. In the event of my wife's marriage, I wish her to have an equal part of my estate set off to her, which shall at her death revert to my children under the above limitations." The will was duly probated on September 9th of the same year, and letters testamentary issued to Simeon Parker Callaway, one of the executors therein named, who was a son of the testator. The property of the estate was kept together until the year 1866, when Mrs. Callaway, the widow of the testator, intermarried with one William Bryant and gave notice to the executor of her election to take dower. The executor thereupon presented a petition for direction to the judge of the superior court of Wilkes county, reciting

in the petition that Mrs. Callaway had remarried and had elected to take dower, and stating various reasons why it was no longer practicable to carry out the intention of the testator of keeping the property together for the support of his family. The executor also set forth the names of the children interested in the estate, some of whom were minors, and stated that one of the adult beneficiaries under the will, Martha L. Callaway, had married Henry E. Spratlin. Included among those alleged to have attained their majority was the name of Marshall S. Callaway. By an order passed at chambers the judge appointed Spratlin as guardian ad litem to represent the minor children, and he accepted the appointment, and, in his representative capacity, signed a written consent that the judge might at chambers render such decree as he might deem proper under the petition, and might decide any issue of fact that might be raised by any of the parties at interest. This written consent appears to have been signed by Spratlin in his individual capacity also, and by all of the children who the petition alleged were adults, except the wife of Spratlin, formerly Martha L. Callaway, and the executor. It was also signed by the testator's widow, Mrs. Bryant, and by William Bryant, with whom she had intermarried. At chambers, on December 13, 1866, the judge passed an order which recited that "the parties interested" had requested that he should "decide the various matters presented in said will," and which directed the executor to sell at public sale, in the same manner as executors usually sell, "all the property of [the testator] except so much as may be set off for the widow's dower." The executor was also, by this order, given instructions as to how to make distribution of the proceeds of the sale. The land belonging to the estate was brought to sale by the executor under this order, was bid off by Samuel Barnett, and on February 5, 1867, the executor made to him a deed. The purchaser at the sale subsequently conveyed the land to Gabriel Toombs, and from him it passed, by a chain of deeds made by persons claiming under him, to Barnett Irvin, to whom it was conveyed on January 6, 1886. The conveyances last referred to purported to convey a fee-simple estate in the land, Samuel Barnett having on January 9, 1867, prior to the executor's sale, secured a deed from William Bryant and his wife, formerly Mrs. Callaway,

to that portion of the tract which she claimed as dower. The portion so claimed as dower was run off and platted by commissioners, she took possession of it as her dower, and it was so treated by all persons concerned, though no order of court formally setting it apart as dower appears of record. Barnett Irvin and his predecessors in title under the executor's sale and the deed conveying the dower interest remained in undisturbed possession of the land up to the time of the death of Mrs. Bryant, which occurred in December, 1898. On January 12, 1900, Simeon Parker Callaway, Marshall S. Callaway, and others claiming under the will of Seaborn Callaway, brought against Barnett Irvin an action to recover the tract of land which Mrs. Bryant had claimed as dower. Soon thereafter Barnett Irvin died, and his administrator, Charles E. Irvin, was made a party defendant in his stead. The defense interposed was: (1) title derived from Samuel Barnett; (2) title by prescription, and the making of valuable improvements on the land; (3) a denial that dower was ever set apart to the widow of Seaborn Callaway; and (4) estoppel, operating against Simeon Parker Callaway, from asserting title to the premises, he having, in his capacity of executor of Seaborn Callaway, conveyed the land by absolute deed to Samuel Barnett, the defendant's predecessor in title. The case was tried by the court without the intervention of a jury, upon an agreed statement of facts, and judgment in favor of the defendant was rendered. The case was then taken to the Supreme Court for review, but was there dismissed for want of prosecution.

The present action is a complaint for land, brought by Marshall S. Callaway on October 3, 1903, against Charles E. Irvin, as administrator of Barnett Irvin, to recover a one-seventh undivided interest in the tract of land in which the plaintiff's mother, Mrs. Bryant, claimed a dower estate. In addition to the defenses interposed to the previous action to which the plaintiff was a party, the administrator filed a plea of *res judicata*. By an amendment to his petition the plaintiff alleged that the order under which the land was sold at executor's sale was void for want of jurisdiction on the part of the judge of the superior court to pass it in vacation without the written consent of all parties at interest, and the sale was attacked on the ground that it was

not made in conformity to the order, and for other reasons. The case proceeded to a trial on the merits, and resulted in the direction of a verdict in favor of the defendant. Exception is taken by the plaintiff to the disposition thus made of his case.

S. H. Sibley, for plaintiff. *S. H. Hardeman*, for defendant.

EVANS, J. (After stating the facts.) 1. As the land which Mrs. Bryant claimed as dower was actually admeasured by commissioners appointed to set apart dower to her out of the lands of her deceased husband, and as she went into possession of this tract, and all persons concerned acquiesced in her assertion of a dower estate therein, including the defendant's predecessors in title, it matters not that no formal judgment of the superior court assigning dower to her was shown to have been rendered. *Wells v. Dillard*, 93 Ga. 682. The right of action of the plaintiff did not accrue until the death of Mrs. Bryant. *Id.* 683; *Napier v. Anderson*, 95 Ga. 618.

2. The plaintiff swore, as a witness on the trial, that at the time the executor of his father's will procured the order of the chancellor authorizing a sale of the property of the estate, he (the plaintiff) was only nineteen years of age; that he had no notice of the executor's petition for direction, and did not sign the written consent upon which the order was based, nor authorize any one to sign his name thereto; and that not until after his mother's death in 1898, when he was investigating his rights with respect to the lands set apart to her as dower, did he learn of the sale made by the executor under color of that order. Counsel for the defendant in error insists, however, that it was not the right of the plaintiff to make this collateral attack upon the order, which is to be treated as the judgment of a court of competent jurisdiction, and the presumption indulged that the plaintiff did consent in writing and that all necessary jurisdictional facts were made to appear to the chancellor. Unless the record of the proceedings shows on its face the want of jurisdiction to pass the order, the position of counsel is doubtless maintainable. *Mayer v. Hover*, 81 Ga. 309, 315. But it affirmatively appears that the judge acted upon the petition without procuring the written consent of Martha L. Spratlin (formerly Miss Callaway), who was one of the beneficiaries under the will of Seaborn

Callaway; and if such consent on her part was necessary, then the record shows upon its face that the order of the judge was void for want of jurisdiction to pass it, as the petition filed by the executor names her as one of the children of his testator who was interested in the estate. The order, if void, could be collaterally attacked by the plaintiff, unless he was for some reason estopped from calling into question its validity. His testimony was therefore pertinent as tending to show he was not instrumental in procuring the order or effecting the sale thereunder, he not having any notice of the proceeding or its result until after his mother's death, years after the sale. It further appears from the testimony introduced in his behalf that he never received any of the proceeds arising from the sale.

3. The only authority which the chancellor had to entertain jurisdiction of that proceeding in vacation was such as was conferred by the act of March 17, 1866. (Acts of 1865-6, p. 221; Civil Code, § 4855.) That act declares that when, "for any reason already existing or to exist, it becomes impossible to carry out any last will and testament, in whole or in part, the judges of the superior court shall have power to render at chambers, during vacation, any decree that may be necessary and legal in the premises; provided all parties in interest consent thereto in writing, and there is no issue as to facts; or if there is such an issue, there is a like consent in writing that the judge presiding may hear and determine said facts, subject to a revision by the Supreme Court, as in other cases;" and provided further, "that in all cases where minors are interested, the consent of the guardian at law or guardian ad litem shall be obtained before such decree is rendered." If Mrs. Spratlin was a party "in interest," the written consent of her husband, acting in his individual capacity and as guardian ad litem for minor children, was insufficient to give the judge jurisdiction over her or to authorize him to pass any order disposing of the property of the estate. The will provided that upon the death of the testator's wife, his executors should divide his property equally between his surviving children and the offspring of deceased children. Mrs. Spratlin was therefore to receive her share of the estate only in the event she survived her mother. The evidence discloses that the husband of Mrs. Spratlin never made any attempt to reduce her

interest in the estate to his possession in the exercise of his marital rights. Accordingly, when the order of sale was passed, she was a party at interest. *Archer v. Guill*, 67 Ga. 195; *Sterling v. Sims*, 72 Ga. 51; *DeVaughn v. McLeroy*, 82 Ga. 704 et seq., and cases cited; *Arnold v. Limeburger*, 122 Ga. 72. On the day that order was passed (December 13, 1866), the married woman's law went into effect; so, when the sale took place, her interest in her father's estate had become a part of her separate estate. Since that time she has not been deprived of such interest by any act on the part of her husband. She, and not he, was therefore the party in interest whose written consent was essential to confer jurisdiction upon the judge of the superior court to pass the order of sale, unless it be that the assent of both was necessary in order to cut off his future right to reduce her property to his possession. The record of the proceedings before the judge disclosed the fact of her marriage, as well as the fact that she was a beneficiary under her father's will; nevertheless, as the record also shows upon its face, her written consent to the judge's entertaining jurisdiction of the executor's petition for direction was not procured, and the order of sale was consequently a mere nullity. Nothing passed to the purchaser at the executor's sale, and the legal title to the reversionary interest in the tract of land set apart as dower was not shown to be in the defendant.

4. The present action is in no legal sense a renewal of that brought jointly by the plaintiff, Simeon Parker Callaway, and others claiming under the will of Seaborn Callaway. *White v. Moss*, 92 Ga. 244. Their right to recover depended upon their ability to show that they and each of them had title as against the defendant. *Wooding v. Blanton*, 112 Ga. 509. If one was not entitled to recover, there could be no recovery by any of his coplaintiffs. *Walker v. Pope*, 101 Ga. 666; *McGlamory v. McCormick*, 99 Ga. 148, and cases cited. The fact being brought to light on the hearing of that case that Simeon Parker Callaway was estopped from setting up title to the land, because of the deed executed by him in his representative capacity as executor of his father's estate in pursuance of the sale he had brought about, a finding in favor of the defendant against all of the plaintiffs was the only logical result of the trial. *Medlock*

v. Merritt, 102 Ga. 212. All the facts with regard to the executor's sale and the connection which the plaintiffs had with the proceeding and the order of the judge under which it was made were ventilated at that hearing. Upon what reason the presiding judge placed his judgment does not appear, but that the judgment was right is apparent. The defendant relied, upon the trial of the case now under review, upon this previous adjudication as sustaining his plea of *res adjudicata*, insisting that a trial was had upon the merits and the same issues were involved. He did not, however, undertake to go further and show what was actually decided.

Upon the party setting up an estoppel by judgment rests the burden of proving it. 1 Herman, Estoppel, §410. It matters not how numerous the questions involved in the suit may be, provided they were tried and decided (Id. §210); for the judgment is conclusive not only of the thing directly decided, but of every fact which was essential to the adjudication. Id. §231. "Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded." 24 Am. & Eng. Enc. L. (2d ed.) 766. But even if a particular matter was put in issue, "if the issue was not determined, by reason of the decision turning upon some other point, or otherwise, there is no estoppel." Id. 776-7. And if "there be any uncertainty as to the precise issue involved and determined in the action, as, for example, if it appear that several distinct matters were litigated, upon any one or more of which the judgment may have turned, the whole matter of the action will be at large and open to subsequent controversy." Id. 773-5. Thus, where several defenses are pleaded, and the judgment does not show upon which issue the decision was rendered, there is no estoppel. Id. 775, note, and cit. "It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U. S. 216. In the case before us no such certainty exists; the defendant in the first suit interposed several defenses, one of which was that Simeon Parker Callaway was estopped, by the deed he had executed, from asserting title to the land; and this special defense was established, and affected not only his right to recover, but also cut off his coplaintiffs from any

recovery in that suit, independently of whether any of the other defenses were meritorious. That the judge reached the conclusion that the defendant had the better title rests upon the bare surmise that the judge may have fallen into the error of so deciding instead of placing his judgment upon the ground that one of the plaintiffs was clearly estopped from setting up his claim of title. As was held in *Worth v. Carmichael*, 114 Ga. 699, "A judgment rendered in litigation between the same parties is not conclusive in a subsequent suit between them on a different cause of action, except as to issues actually made and determined in the former litigation." See also *Draper v. Medlock*, 122 Ga. 234. That the plaintiff had an opportunity of having the merits of his claim passed on by the court, and was not cut off therefrom by the fact that one of his coplaintiffs had estopped himself from maintaining the action, should be made to affirmatively appear before the plaintiff is denied the privilege of proving, as he is now able to do, that his claim is just. "The estoppel" which the law contemplates "does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his day in court and an opportunity to establish his claim. . . . Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor." *Fifield v. Edwards*, 39 Mich. 266-7. So it has been held that even in an equitable proceeding the rule is not different, and "where in the answer various matters of defense are set forth, some of which relate only to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of defense, it is impossible to hold that the decree operates to preclude future proceedings." *Foster v. The Richard Busteed*, 100 Mass. 409. We are content to rest our decision upon this question on the reasoning of the learned justice who pronounced the opinion in that case.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

WHITE *v.* SOUTHERN RAILWAY COMPANY.

1. In a suit against a railway company to recover damages for the homicide of a passenger, it is proper to disallow an amendment to the plaintiff's petition when the allegations thereof need no amplification, and the only additional matter sought to be introduced by way of amendment is the assertion that the defendant company owed to the passenger a legal duty the non-observance of which could in no way have brought about or contributed to the injury of which complaint is made.
2. Interrogatories which have not been properly executed and returned into court can not, without an order authorizing steps to be taken to have the same re-executed and returned, be lawfully taken out of the office of the clerk by counsel and sent back to the commissioners with instructions to make another return of them to the court.
 - (a) In view of the admissions made in open court by plaintiff's counsel, the depositions were incompetent evidence.
 - (b) That the defendant did not in writing except to the improper execution and return of the interrogatories and serve the plaintiff with the notice prescribed by statute afforded no reason, under the facts appearing, why the court should have declined to suppress the depositions.
3. A narrative as to the circumstances under which a person was injured in alighting from a moving train, given by him a half hour or more after he was hurt, to persons arriving on the scene, is not admissible as a part of the *res gestæ* of the occurrence. Nor can a statement as to what occurred, made by him on the following day to an agent of the defendant, who reduced the statement to writing, be regarded as competent evidence.
4. The uncontradicted evidence submitted by the defendant company demanding the finding which the jury returned in its favor, the plaintiff was not entitled to a new trial, irrespective of whether the court correctly charged the jury as to the law governing the case.

Argued May 17, — Decided June 16, 1905.

Action for damages. Before Judge Reagan. Monroe superior court. October 1, 1904.

The plaintiff below, Carrie White, brought an action against the Southern Railway Company to recover damages for the homicide of her son, Titus White, who at the time of his death was nineteen years of age. The allegations of fact on which the plaintiff relied for a recovery were as follows: On or about January 7, 1901, Titus boarded one of the passenger-trains of the defendant company at Dames Ferry, and, after the train started, informed the conductor that he wished to be put off at a place called the coal chute, about seven miles north of Dames Ferry, where the company was in the habit of taking on and letting off passengers. The conductor agreed to put him off at the coal chute, as did also the porter of the train. Plaintiff's son was un-

acquainted with the location of the stations and the distance between them. The train stopped at the coal chute and started on again without any of the company's officials advising Titus of the fact that the coal chute had been reached, and without his knowing it; and when the train started to running again, the conductor informed him that the coal chute had been reached, and told him to get off the moving train. He accordingly got off the train, not knowing how fast it was running, being governed entirely by the conductor's advice and command. While in the act of alighting the plaintiff's son was thrown violently to the ground in the darkness, and the moving train passed over his leg and arm, and he was so grievously wounded that he died on the following day. The negligence charged against the company was, (1) that the servants having charge of its train carelessly and negligently failed to stop it long enough at the coal chute to put off plaintiff's son safely or to afford him an opportunity to alight; (2) that the conductor improperly directed him, an ignorant country boy, to get off the moving train, which was "unusual negligence," in that the conductor and porter were thoroughly familiar with the road in that locality and with the surroundings and the speed of the train, whereas plaintiff's son had no such knowledge and was relying absolutely upon the direction and will of the conductor, in whom he trusted and whose duty it was to see that he got off the train safely; and (3) in addition to such gross negligence, the defendant company was also negligent in failing to exercise towards plaintiff's son that extraordinary diligence which the law imposes upon it. At the trial the plaintiff offered an amendment to her petition, wherein she reiterated the statement that her son was a passenger on the train and the company was under a duty to put him off safely at the coal chute or afford him an opportunity to alight with safety, and wherein she further alleged "that the defendant company being advised that Titus White desired to get off at the chute, it was its duty to afford him a safe place to get off, and to select such a safe place and to see to it that he did get safely off," but nevertheless the defendant negligently started its train without giving him an opportunity to safely alight, and he was thrown from the train and killed. The court declined to allow this proffered amendment, for the reason that its allegations were

substantially covered by those in the original declaration, "except the one that it was defendant's duty to afford a safe place to alight at," which was demurrable. To this ruling the plaintiff excepted *pendente lite*. A verdict in favor of the defendant was returned, and the plaintiff excepts also to the overruling of her motion for a new trial. The grounds of the motion will appear from the opinion.

M. W. Harris, J. R. Cooper, W. C. Lane, and Samuel Ruthford, for plaintiff. *Dessau, Harris & Harris*, for defendant.

EVANS, J. (After stating the facts.) 1. No harm resulted to the plaintiff from the refusal of the trial judge to allow the amendment to her petition, the allegations of which needed no amplification. The only new matter sought to be introduced by way of amendment was the assertion that the company owed to her son the duty of providing a safe place at which he could alight; that it failed to observe this duty is not alleged. Even regarding the company's coal chute as a regular station at which it received and discharged passengers, its failure to provide a place where passengers could safely alight in no way brought about or contributed to the injury received by him. On the contrary, the plaintiff alleges that the train was negligently started before her son was given an opportunity of leaving it in safety, and that his injury was caused by the negligent act of the conductor in directing him to get off the train while it was in motion. The allegation that the company owed him the duty of furnishing a safe place at which he could alight was wholly irrelevant and immaterial.

2. Upon the call of the case counsel made to the court a statement to the following effect: Certain interrogatories which the plaintiff had sued out for S. A. Alexander, of Mississippi, were returned to the superior court of Monroe county and were received by the clerk of that court. Upon the request of plaintiff's counsel the clerk mailed them to him at Macon, Ga. Upon receiving the package counsel discovered that the commissioner who had made the return of the interrogatories had not signed and sealed the same upon the back of the envelope, and that the receipt of the postmaster at Forsyth, Ga., was not signed as written out. Thereupon counsel returned the package to the

postmaster in Mississippi from whom it came, with the request that the commissioner be required to sign and seal same on the back. Subsequently the clerk of the court received the interrogatories by due course of mail, the package being signed by the postmaster at Forsyth and the names of the two commissioners appearing upon the back of the envelope with their seals. Before receiving the interrogatories from the clerk, counsel had taken an order from the judge to open the same, but he did not open the package while in his hands, nor was anything written thereon. At the conclusion of this statement the court, on motion of the defendant, held that the interrogatories could not be received in evidence, and announced that they would be suppressed, because they had not been returned under an order of the court for correction and re-execution. Counsel for the plaintiff then stated in his place that he had construed the order to open the interrogatories as granting leave to take them out of the clerk's office. The court replied that this was an unauthorized liberty and an unwarranted construction of the order. Complaint is made that the plaintiff was thus unjustly deprived of the benefit of the interrogatories, inasmuch as "no contention was made by anybody that the interrogatories had been opened, changed, or tampered with after they had been re-executed." It was certainly not incumbent on the defendant to make any charge of fraud which could not, because of the defendant's lack of knowledge of the facts, be substantiated. The defendant was informed that counsel for the plaintiff had, without right, procured the clerk to mail the interrogatories to him, and had then, upon discovering that they had not been properly returned to the court, started them off on an unauthorized journey to Mississippi. Into whose hands they actually fell or what transpired during their sojourn in that State the defendant was not expected to know, nor was the counsel for the plaintiff in a position to say. It did appear that the interrogatories had not been executed and returned into court conformably with law. This fact was all-sufficient to warrant the court in suppressing them; for until properly executed and returned they could not be used as evidence. Counsel, upon ascertaining that they had not been returned into court in accordance with law, had the choice of two courses: that which the court ruled he should have pursued,

and that which he followed. He chose the wrong one. The question is not whether any fraud was perpetrated in the present instance, but whether such an inexcusable disregard of the prescribed practice for securing the testimony of witnesses by interrogatories can in any case be countenanced. In view of the opportunities for fraud which would be afforded if so grave a departure from the practice to be observed were tolerated, no doubt should be entertained that the ruling of the trial judge was eminently right and proper. Counsel for the plaintiff insisted before this court, however, that the defendant had no right to move to suppress the depositions, not having complied with the provisions of the Civil Code, § 5314, which declares that "All exceptions to the execution and return of commissions must be made in writing, and notice thereof given to the opposite party." Where a party fails to comply with the requirements of this section, he can not, of course, complain that the trial court declines to suppress interrogatories because of want of proper execution. *Galceran v. Noble*, 66 Ga. 367; *Langford v. Driver*, 70 Ga. 589. But in the present case, counsel for the plaintiff invoked a decision of the court as to the propriety of treating the depositions as trustworthy evidence, waiving all benefit of the provisions of the statute with respect to notice of exceptions which the opposite side might have presented. Counsel admitted he had so far meddled with the depositions as to send them into a sister State and secure upon the package the indicia of a legal execution and return which had not in point of fact been had in the first instance, and he voluntarily called down upon his client the just wrath of the court, which was warranted of its own motion to thereupon exclude the interrogatories. The conduct of the counsel in thus bringing to the attention of the court the truth with regard to the matter was straightforward and manly. That the result of so doing operated to the prejudice of his client is, perhaps, something to be regretted, but not something which affords cause for reversing the decision of the trial court.

3. The fact was developed by the plaintiff's evidence that after the train on which her son had taken passage had proceeded on its journey after having stopped at the coal chute, he was found lying near the track and was seriously injured. The plaintiff sought to show by two witnesses, who arrived on the

scene some half an hour after the train had departed, that the injured man told them he had gotten on the train at Dames Ferry and had informed the conductor he wanted to get off at the coal chute, and that the way in which he received his injury was that the conductor had hurried him to get off the moving train—had pushed him and told him to get off “damned quick,”—and he obeyed the order and was injured. The plaintiff also offered to prove, as a part of the *res gestæ* of the occurrence, the statement made by her son on the following morning, in the presence of a physician and an agent of the company who reduced his statement to writing, concerning the manner in which he got hurt. As a matter of course, the court ruled that none of this evidence was admissible. The court also declined to require either the company’s agent or its counsel to produce the written statement so that plaintiff might introduce it in evidence; and the court rightly declined to do so. In reply to the complaint which the plaintiff makes of these rulings, it is only necessary to cite a few of the many instances in which this court has expressly held that such declarations are incompetent. *Augusta and Summerville R. Co. v. Randall*, 79 Ga. 304; *Holland’s case*, 82 Ga. 257; *Roach v. R. Co.*, 93 Ga. 785; *Electric Ry. Co. v. Carson*, 98 Ga. 652; *Newsom v. Georgia Railroad*, 66 Ga. 57; *Boole v. Ry. Co.*, 92 Ga. 337; *Weinkle v. R. Co.*, 107 Ga. 367; *W. & A. R. Co. v. Beason*, 112 Ga. 553. The writing made by the company’s agent had no evidentiary value whatsoever. *Carroll v. Ry. Co.*, 82 Ga. 452 (4), 473.

4. The evidence introduced in behalf of the plaintiff failed to establish any of the specific acts of negligence alleged in her petition, or to disclose under what circumstances her son met with his injuries. She therefore necessarily had to rest her case entirely upon the presumption of negligence raised by law from the fact that he was injured by the running of the defendant’s train. Civil Code, § 2321. The company submitted evidence bringing to light the following facts: The coal chute was not a station or a regular stopping-place, though passengers were permitted to get off when trains stopped for coal or water. On the evening of January 7, 1901, a northbound passenger-train arrived at the coal chute shortly before 8 o’clock, and stopped there four or five or possibly as long as seven minutes. The engineer had charge of the stopping and starting of the

train at the coal chute, it not being a station. After the train came to a standstill, the conductor assisted a gentleman, a lady, and a child to alight, at the same time warning them not to go on the main line, as a freight-train was expected to pass at any moment. The conductor then went inside the second-class car, sat down, and began reading a newspaper. He was approached by a negro passenger who had a ticket from Dames Ferry to Juliette, a station a mile beyond the coal chute, and was asked if that place was the coal chute; the conductor said "yes" and the negro then said he wanted to get off there. The conductor told him "all right," to get off if he wished, but he had better be in a hurry. The train was at the time standing still. The negro immediately went out upon the platform, apparently for the purpose of getting off, and was not afterwards seen. He appeared to be an able-bodied man, twenty-two or twenty-three years of age, and capable of taking care of himself. The ground was level at the point where the car was standing, and he could have alighted therefrom in safety within half a minute. A few minutes after the negro left the conductor the passenger-train "pulled up" to let the freight-train pass, and in a few moments afterwards proceeded on its journey. The statement of the conductor as to the conversation inside the car between him and the negro was corroborated by the testimony of the only other occupants of the car, a colored preacher and the newsboy, both of whom testified that the conductor merely cautioned the negro by telling him he had better get off pretty quick, and one of whom added that the conductor displayed no anger or impatience towards the negro. After this conversation, the car remained motionless for from one to two minutes. The front end of it was sixty-five feet distant from the coal chute, opposite which the engine and tender had been stopped for the purpose of taking on coal, and under the apron of which the plaintiff's son was found shortly after the departure of the train. There was at that point blood on the track, and also on a post which stood within a distance of fourteen inches of the point to where the eaves of a passing passenger-coach would extend. Had the injured man been on the bottom step of a car, leaning outward, after the train was started, he might have been knocked off by coming into contact with this post.

No attempt was made by the plaintiff to discredit any of the defendant's witnesses; and this being so, and their testimony fully exonerating it and overcoming the presumption of negligence upon which the plaintiff relied for a recovery, a verdict in her favor would have been wholly unwarranted. *W. & A. R. Co. v. Beason*, 112 Ga. 553, 556, and cit. And the verdict returned by the jury being demanded by the evidence, it is unnecessary to consider whether the charge of the court is open to any of the criticisms made upon it, or whether it fully covered all the issues in the case. *Peoples Savings Bank v. Smith*, 114 Ga. 185. For the trial judge to have granted a new trial would have been an abuse of discretion.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SLOCUMB v. STEWART.

EVANS, J. It appearing from the evidence of the defendant that the promissory note and mortgage given by him to the plaintiff were infected with usury, in that the principal of the note was made up of two items aggregating \$450, upon which sum \$50 interest had been charged for a period of a little over nine months, the plaintiff saying he would exact 12 per cent. upon \$350 of that amount and 8 per cent. upon the remaining \$100; and the plaintiff testifying that he was not, for want of recollection, in a position to swear positively that any other items of indebtedness were included in the principal of the note, and admitting that it was his intention to charge 80 cents on every \$10 of the principal for the time the note was to run, a period considerably less than a year, a charge by the court based on the theory that the plaintiff made an honest mistake of fact in calculating interest on the principal at the rate of 8 per cent. per annum, and that he had no intention to exact any usury, was not warranted by the evidence, and the finding of the jury that he had no such intention should have been set aside.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 19, — Decided June 16, 1905.

Illegality. Before Judge Lewis. Jones superior court. January 9, 1905.

Johnson & Johnson, for plaintiff in error.

Hardeman & Moore, R. N. Hardeman, and J. C. Barron, contra.

FOKES v. WELLS.

LUMPKIN, J. This court will not disturb the first grant of a new trial upon certiorari from a city court, unless the verdict is demanded by the evidence. *Brantley v. Taylor*, 121 Ga. 475.
Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 19, — Decided June 16, 1905.

Certiorari. Before Judge Littlejohn. Dooly superior court. October 29, 1904.

Watts Powell, for plaintiff. *M. P. Hall*, for defendant.

CHAMBLISS v. HAWKINS.

The city court of Americus has jurisdiction to foreclose a lien in favor of the proprietor of a sawmill on the product of the mill, for work done on material furnished by another, at least where the principal of the amount claimed does not exceed the jurisdiction of the county court.

Argued May 20, — Decided June 16, 1905.

Foreclosure of lien. Before Judge Crisp. City court of Americus. January term, 1905.

J. H. Lumpkin, for plaintiff. *Hall & Wimberly*, for defendant.

FISH P. J. Chambliss instituted a proceeding in the city court of Americus, against Mrs. Hawkins, to foreclose a lien for \$453, claimed by him as proprietor of a sawmill, on certain lumber sawed by him from timber furnished by the defendant. When the issue made by defendant's counter-affidavit came on to be heard, she moved to dismiss plaintiff's case, on the ground that the city court of Americus did not have jurisdiction of the subject-matter of the suit, but that the superior court of Sumter county had exclusive jurisdiction thereof. The motion was sustained and the case dismissed. The plaintiff excepted. The act creating the city court of Americus (Acts 1900, p. 93, sec. 2) provides, that it "shall have jurisdiction to try and dispose of all civil cases of whatsoever nature, except those cases over which exclusive jurisdiction is vested in the superior courts by the constitution and laws of the State of Georgia," etc. The proceeding to foreclose the lien of the proprietor of a sawmill is not one of those cases of which the superior court is given

exclusive jurisdiction by the constitution. Civil Code, § 5842. The question then is, do the statutes of the State confer upon the superior court exclusive jurisdiction of a case of the character of the one under consideration? Civil Code, § 2807, declares: "Proprietors of planing-mills and other similar establishments shall have the same lien as provided in section 2805, for work done on material furnished by others," and in *Murphy v. McGough*, 105 Ga. 816, it was held that a sawmill is a similar establishment to a planing-mill, and that therefore "The proprietor of a sawmill has a lien on the product of the mill for work done on material furnished by others." Section 2805 provides: "All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property, shall have a special lien on the same," and declares that when such lien is not asserted by retention of the property, it "shall be enforced in accordance with the provisions of section 2816 of this Code." This last-named section provides: "Liens on personal property, not mortgages, when not otherwise provided, shall be foreclosed in accordance with the following provisions:" (1) There must be a demand on the owner, etc., and a refusal to pay. (2) It must be prosecuted within one year after the debt becomes due. (3) The person prosecuting such lien, or his agent or attorney, must make affidavit showing all the facts necessary to constitute a lien under the code, and the amount claimed to be due; and "if the amount claimed is under one hundred dollars, the application may be made to a justice of the peace, who may take all the other steps hereinafter prescribed, as in other cases in his court." (4) "Upon such affidavit being filed with the clerk, it shall be the duty of the clerk of the superior court or the justice of the peace, if in his court, to issue an execution instanter against the person owing the debt, and also against the property on which the lien is claimed, or which is subject to said lien, for the amount sworn to, and the costs, which execution, when issued, shall be levied by any sheriff of this State, or bailiff, if the amount be less than one hundred dollars, on such property subject to said lien, under the same rules and regulations as other levies and sales under execution." (5) "Affidavits may be made before any officer authorized to administer an oath." (6) The defendant, or any cred-

itor of his, may contest the amount or justice of the claim, or existence of the lien, by filing an affidavit of the fact, setting forth the ground of such denial, "which affidavit shall form an issue to be returned to the court and tried as other causes." The other two paragraphs of the section are not material here. According to the provisions of § 2816, considered alone, it would, therefore, seem that the superior court has exclusive jurisdiction of the foreclosure of sawmill liens on personalty, where the amount claimed is not less than one hundred dollars, but where the amount claimed is under one hundred dollars the justice's court has concurrent jurisdiction with the superior court. On the question whether the superior court has exclusive jurisdiction when the amount claimed is not less than one hundred dollars, the jurisdiction of the county court must be considered. Section 4208 of the Civil Code confers jurisdiction on the judges of the county courts to "foreclose mortgages on personal property and liens." This language means either that the judge of a county court, when the amount claimed is within the jurisdiction of the county court, has jurisdiction to foreclose all liens, except mortgages on realty, or that he has jurisdiction to foreclose liens on personalty only. This being true, in either case he has jurisdiction to foreclose a sawmill lien on personalty. The jurisdiction of the county courts extends "into the county town, district or districts, to all civil cases of contract or tort (save where exclusive jurisdiction is vested in the superior court) where the principal sum claimed in cases of contract or damages in cases of tort does not exceed five hundred dollars; and over the remainder of the county, when the principal sum aforesaid does not exceed five hundred dollars nor is less than fifty dollars." Civil Code, § 4193. The words, "save where exclusive jurisdiction is vested in the superior court," in our opinion, refer to the cases enumerated in the constitution over which that instrument declares the superior court shall have exclusive jurisdiction.

We think this view is supported by the decision in *Durden v. Clack*, 94 Ga. 278, wherein it was held: "The county court has jurisdiction to try and determine applications for the eviction of intruders." The Code of 1882, § 4074 (now Civil Code, § 4810), declares that in a proceeding to eject an intruder, "the sheriff

shall return both affidavits and deposit them in the office of the clerk of the superior court of the county in which the land lies, upon which an issue shall be made up and tried by a jury, according to the laws of the State." Certainly this language as strongly indicates that the superior court shall have exclusive jurisdiction of proceedings to eject intruders (especially as there can be no trial by jury in civil cases in the county court) as the language, "Upon such affidavit being filed with the clerk, it shall be the duty of the clerk of the superior court . . . to issue an execution," indicates that the superior court shall have exclusive jurisdiction of proceedings to foreclose liens, other than mortgages, on personal property. If it should be suggested that the Civil Code, § 4208, expressly confers jurisdiction upon judges of county courts to hear and determine applications for the eviction of intruders, it will be noted, as we have already seen, that the same section also expressly confers upon them jurisdiction to "foreclose mortgages on personal property and liens." Again, if it be asked what procedure will be followed if judges of county courts have authority to foreclose liens on personalty, other than mortgages, the reply is, that the Civil Code, § 4204, provides: "The practice and modes of procedure in the county court . . . shall be the same as in the superior court, unless otherwise provided." And surely there would be no more difficulty as to the procedure in the county court in the foreclosure of liens, not mortgages, on personal property, than in the procedure in such court to evict intruders. Again, "The county court, where the amount sued for is within its jurisdiction, has jurisdiction to render a judgment foreclosing a mechanic's lien on realty." *Wheatley v. Blalock*, 82 Ga. 406. The Civil Code, § 2807, provides: "Proprietors of sawmills, when furnishing material for the improvement of real estate, to purchasers from them for that purpose, shall be entitled to the lien provided in section 2801, to be governed, when the same are applicable, by the rules laid down in said section 2801." This last-named section establishes liens on real estate in favor of mechanics and materialmen. In fixing the jurisdiction of county courts, could the legislature have intended that such courts should have authority to render a judgment foreclosing a lien on realty for five hundred dollars in favor of the proprietor of a sawmill for material furnished to improve

such reaky, but that such courts should not have jurisdiction to foreclose a lien for five dollars in favor of the proprietor of a sawmill on lumber he had sawed from timber furnished by his debtor? We can not believe that the legislature ever entertained such an irrational intention. If the county court has no jurisdiction of the foreclosure of a sawmill lien on personalty, then, of course, it has no jurisdiction of the foreclosure of liens on personalty in favor of laborers, landlords for necessities furnished, nor of any other such liens, established by statute, in favor of various classes of persons, as all such liens, when not otherwise provided, must be foreclosed according to the provisions of Civil Code, §2816. It has, however, long been the practice, and, so far as we know, without question of the court's jurisdiction, to foreclose all such liens in the county courts, when the amount claimed was within the jurisdiction of such courts. This fact may be considered as showing the opinion of the bar as to the jurisdiction of county courts in such cases. For the reasons stated, we are confident that the county court has concurrent jurisdiction with the superior court of the foreclosure of a lien in favor of the proprietor of a sawmill, for work done on material furnished by the debtor, where the amount claimed is within the jurisdiction of the county court. This being true, the superior court in such a case does not have exclusive jurisdiction under the statute. Therefore, as exclusive jurisdiction is not conferred upon the superior court, either by the constitution or the statute, of the foreclosure of a sawmill lien on personalty, when the amount claimed is within the jurisdiction of the county court, it necessarily follows that the city court of Americus has jurisdiction to foreclose such a lien, at least when the amount claimed is within the jurisdiction of the county court; and the trial judge erred in holding otherwise and dismissing the case.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

CENTRAL OF GEORGIA RAILWAY COMPANY v.
GORTATOWSKY.

1. A presiding judge of a trial court should not direct the jury to find a verdict in favor of one party against the other, except where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict. Where there is conflict in the evidence on material issues, it is error to direct a verdict.
2. In order to make a contract there must be an agreement of parties. If there is a proposition but it is not accepted, no binding contract results.
3. If shippers applied to a railroad agent for a rate for the transportation of certain men and horses, and the agent (who was a "commercial agent" whose duty was to solicit business), not having authority to make a special rate, telegraphed to the general agent for the purpose of obtaining one, and the general agent replied through the telegraph office of the road, stating a rate, but by an error in transmission the telegram, as delivered to the agent dealing with the shipper, stated an amount lower than the general agent had written in the original telegram; and if upon receipt of such telegram the agent correctly quoted the rate as stated in it to the shippers, and if they accepted such offered rate in good faith, and the mistake was not evident, and they did not have knowledge of it, this created a binding contract upon the company.
4. If the mistake was evident on its face or known to the shippers, they could not seize upon it to take an unfair advantage of the other party.
5. If a contract is made, one party to it can not rescind it by merely giving notice to the other of his intention to do so, without the agreement or assent of such other; but it may be rescinded with the assent of both parties.
6. This case should have been submitted to the jury, and it was error to direct a verdict.

Argued May 22, — Decided June 16, 1905.

Complaint. Before Judge Spence. Dougherty superior court. October 4, 1904.

A. C. Gortatowsky et al. brought suit against the Central of Georgia Railway Company for the sum of \$552. On the trial the evidence showed, without conflict, the following facts: I. C. Brinson was the commercial agent of the defendant at Albany. His duties were to solicit business. He did not have authority to make contracts for special rates on its behalf, and this was known to the plaintiffs. At their instance he telegraphed to J. C. Haile, the general passenger agent at Savannah, who had authority to make special rates for the road, for such a rate for the transportation of troops from Lytle to Albany and return. Haile wrote, and delivered to the railroad telegraph office in Savannah, a telegram dated November 30, 1903, directed to Brinson, the

body of which was as follows: "Chairman has announced rate six dollars each direction movement troop Seventh Cavalry Albany Lytle return account street fair for men, rate on horses fifty dollars per car special service. Quote this rate to committee endeavor secure deposit for movement our line advising." In transmission a mistake was made in this message by the omission of the word "direction," thus making the message read, "six dollars each," instead of "six dollars each direction." Brinson quoted this rate to Gortatowsky on Tuesday, December 1, 1903, about noon. On the same day plaintiffs wrote to Haile a letter, the material parts of which are as follows: "We would appreciate it if you would allow us to pay one half of this transportation now, balance due carnival week; inasmuch as the subscription given by the merchants, only one half is payable now, balance during carnival. Unless absolutely necessary, we would not care to advance the entire amount now, as our advertising expense is very heavy. You will kindly advise Mr. Brinson if this is perfectly satisfactory." On the next day Haile replied in a letter which contained the following: "We would like very much to accommodate you in the matter of payment, but it is not within our power to deviate from our usual custom with respect to collecting prepaid transportation; therefore we are powerless to do anything except to instruct our representative to collect the full amount sufficient to cover the movement, Lytle to Albany, which is \$510.00 provided coaches are used; if sleepers are used, \$570.00." Brinson later received a copy of the letter written to the plaintiffs, telegraphed to Haile, and learned of the mistake on Thursday. He notified plaintiffs of it. The troops were carried to Albany, plaintiffs paying the amount of \$552. Afterwards they were transported back to Lytle, and plaintiffs again paid \$552 under protest, and it is for this that suit is brought. The difference between \$570 and \$552 was due to the fact that not as many men were carried as at first it was thought would be transported.

As to other matters in connection with the transaction, it is necessary to briefly set out the testimony of each side respectively. One of the plaintiffs testified as follows: The rate was quoted to them on Monday or Tuesday. They accepted it in good faith. There was nothing in the rate quoted to put them on

notice that it was wrong. Brinson did not say that the rate was any lower than it had been, and the rate quoted to plaintiffs was that which they expected to pay, and which they told Brinson would be the usual rate. Brinson told the plaintiffs that Haile had telegraphed him, and was expecting him to secure "the movement;" and plaintiffs said to him that they expected to pay about six hundred dollars, and to get the rate and he would get the business. He told them that he would have to get the rate from Haile. Brinson went to one of the plaintiffs on the night of December 3, and told him that the rate which he (Brinson) had quoted was a mistake, and that the amount named would be for each way. When Brinson first quoted the rate the witness told him that it was a contract, that they would take the rate and to go ahead, that it was his "movement." The plaintiffs afterwards wrote a letter to Haile asking him to let them pay one half of the freight at that time. But the rate was accepted without any condition. Prior to these negotiations plaintiffs had spent \$20 in advertising this attraction for the carnival. Brinson telegraphed to Haile, on the 30th of November or the first of December, that he had secured "the movement." A check for \$570 was given to Brinson. The difference between this and \$552 was refunded, or the amount corrected. The check bore date December 2, and on it were the words, "movement troop C." In regard to this payment the witness testified as follows: "We paid the money to him the latter part of the week some time. When we paid Mr. Brinson that money we understood that there had been a mistake; but I will tell you why we paid the money. When Mr. Brinson sent the telegram, that was right after he received the telegram, and he said, 'I have wired Mr. Haile that I have received that money, and when he wires me to dispose of it I will come over and get a check for it,' and it was there subject to Mr. Brinson's call; when we paid that money we understood that it was for the payment of the troops one way. We lost a good deal of money on the carnival, and this attraction did not prove as much as we thought it would; I don't know that I knew until after the carnival was over that we had lost a good deal of money, because one or two days of a carnival can pick up things wonderfully. It is not true that I did not make any complaint about this matter until I

found out how much we had lost on the carnival. I notified Mr. Brinson the night of the third, when he came to the opera house and told me that he had gotten instructions from Mr. Haile that there was a mistake in that telegram, and we told him that we were going to hold them to it, and he said, 'I know I never made a mistake about it.'" After the troops were brought to Albany, plaintiffs demanded that the defendant should return them without additional compensation; which it refused to do. Another witness for the plaintiffs testified, that he was present when Brinson spoke to one of the plaintiffs about the mistake in the rate quoted; that the plaintiff stated that that was wrong, and Brinson replied, "Yes I think it is a mistake, and I so wired Mr. Haile," and that the plaintiff said, "I want you to understand that I expect to hold the railroad to this rate." This witness appears to have been an agent for the plaintiffs. He further stated, "Mr. Brinson sent me a receipt by a boy, and I took it, as I didn't know what it was. He brought it to me in an envelope. I sent the check to him, and told the boy not to accept any receipt." Another of the plaintiffs testified, that the rate quoted was accepted in good faith, because he knew that the defendant had made four "movements" of this cavalry at a cent a mile; that he had investigated it beforehand to find out what it would cost them.

Brinson testified, among other things, as follows: "Plaintiffs made no agreement with me relative to the movement of troop C, other than that if my rate were as low as they could get over other lines that they would give me the movement. . . . When I quoted that rate to Mr. Gortatowsky I do not remember what he said; but he gave me to understand that he liked that rate, and that it was lower than he really expected. There was no written contract entered into at the time; there was no oral acceptance of it—he simply said that it was better than he expected. I didn't have any intention of making a contract at the time I quoted the rate. . . . I notified Mr. Gortatowsky of the mistake, between nine and ten o'clock Thursday night, and they said it must be wrong, and that I had better take the matter up with Mr. Haile. They had not paid me any money at that time." No money had been expended by plaintiffs except for advertising, which was done before the rate was quoted. Plaintiffs paid Brinson the money on Friday afternoon, and he

gave a receipt stating that it was for the movement of troop C, Lytle to Albany, "and it was understood then that that was for one way." He afterwards said that he made this statement "because my former rate had been withdrawn." The troop left Lytle at ten o'clock Saturday night, and arrived in Albany about three o'clock Sunday afternoon. "I received my first real complaint about it about Thursday of the following week during the carnival, forty-eight hours before the troop left. The attendance of the carnival had not been good, and both of the Gortatowsky brothers stated to me that they were losing money. The rate that was first quoted was exceedingly low, being less than one cent a mile for the round trip, the mileage being, if I remember correctly, 353 miles; and I stated to Gortatowsky on my first trip that it was an exceedingly low rate, and he stated that it was a very low rate because it was less than a cent a mile. . . I don't know that that rate was accepted by Gortatowsky brothers. He had already stated that he would give me the business, and when I quoted the rate he stated to me that it was very low and satisfactory, and I understood that the movement was mine before I quoted the rate—that is, that the movement was mine provided I could quote a rate as low as any of the other roads, and as to whether they accepted the rate when I quoted it is the question. He never used the word that he would accept the rate; he said that he was very glad to get the rate. I had telegraphed and written Mr. Haile that I would secure the movement, before I had quoted the rate. . . On Thursday I received this telegram from Mr. Haile, showing that this mistake had been made. It is not true that at that time the Messrs. Gortatowsky told me that they would expect me to protect that rate quoted them by mistake. I showed him that telegram in the opera house at the time, and if he said that I didn't hear it, and I wasn't put on any notice at that time that we would be held responsible for that rate. . . Gortatowsky brothers made no direct statement to the effect that they would release us from the rate already quoted." At the conclusion of the evidence the court refused to direct a verdict for the defendant, but directed one for the plaintiffs. Defendant excepted.

Wooten & Hofmayer, for plaintiff in error.

Crosland & Jones, contra.

LUMPKIN, J. (After stating the foregoing facts.) The court may direct the jury to find for the party entitled thereto, where there is no conflict in the evidence, and where that introduced, with all reasonable deductions and inferences therefrom, demands a particular verdict. Civil Code, § 5331. Unless this state of facts exists, a verdict should not be directed, but the jury should be left to pass on the issues. In this case there were two leading questions: Did the parties ever arrive at a valid, binding contract; and, if so, was there a rescission or release from the original terms by mutual consent or agreement? The first question may be divided into two subordinate parts: First, when the telegraphing agent made a mistake in transmission, and Brinson correctly offered to the plaintiffs the rate as received by him, considering what had transpired previously and also at that time, did the plaintiffs accept this rate and make a contract whereby they agreed to have the troops transported over the defendant's road and the defendant agreed to so transport them? Second, if there was such an acceptance by the plaintiffs in good faith and without notice of any mistake, was it binding on the company, or was the defendant relieved by reason of the mistake in the transmission of its message? The first of these last-mentioned questions is one of fact; the second, one of law. On the subject of acceptance, the evidence for the plaintiffs was to the effect that when Brinson quoted the proposed rate to them they accepted it. Nevertheless they wrote to Haile, asking him to agree for them to pay one half of the amount in cash and the balance later; and though he declined this, they succeeded in getting Brinson to treat the matter as if they had made some deposit, when in fact they had made none until after they were notified of the mistake. It is true that Haile's telegram to Brinson says, "Endeavor secure deposit," etc. But his letter to plaintiffs, dated December 2, required prepayment. The first check which was given to Brinson bore date on its face December 2, though in fact it appears not to have been given until Friday, December 4. Brinson denied flatly, in one part of his testimony, that the rate quoted by him was accepted, or that he understood that a contract was then made; while elsewhere he said that the plaintiffs had told him they would give him "the movement" if he could quote as low a rate as others, and that when he did inform them of Haile's tele-

gram naming the rate they expressed themselves pleased with it. His testimony, considered in connection with the letters above referred to, makes it by no means absolutely certain that any contract was consummated, so as to authorize the direction of a verdict. If his statement be correct, that the plaintiffs merely said that the rate was low, or was satisfactory, or the like, did the plaintiffs, in the light of all the evidence, bind themselves to make the shipment at that rate? Whether or not there was an acceptance and a completion of a contract should have been left to the jury. If the rate stated in the telegram received by Brinson was correctly communicated by him to the plaintiffs, and they accepted it and closed the contract at that rate, and were not in a position where they knew or ought to have known of the mistake, would the railroad company be bound by the contract, or would it be relieved by reason of the mistake made in the transmission of the message of its general agent? Two opposing views on this subject are entertained by the courts, which are respectively very well stated in the opinion of the majority, and in the dissenting opinion of Clark, J., in the case of *Borden v. Richmond & D. R. Co.*, 113 N. C. 570. The views of the majority of the court are expressed in the headnotes of that case as follows: "1. Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, a party to it can not be allowed to evade the performance of it by the simple statement that he has made a mistake. If, however, a proposal by one evidently contains a mistake, the other can not, by snapping at it, be permitted to take advantage of the error. 2. Where a local freight agent of a defendant railroad company made a written order to ship cotton between two points at 69 1/2 cents per hundred for plaintiff, who at once, and in writing, accepted the offer, and it was conceded that the said local agent was authorized to make such proposal on the part of the defendant, and the agent plainly and unequivocally expressed what he understood to be the price to be charged for carrying cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract; and it appears that, by an error in the transmission of a telegram from the general freight agent to the local agent, '89 1/2' was changed to '69 1/2': Held, (1) that the contract was binding on defend-

ant company, notwithstanding the mistake; (2) that in an action by the shipper (who had paid the larger rate under protest) to recover the difference between the two rates, all evidence in regard to plaintiff's purchase of cotton was irrelevant, and plaintiff was entitled to recover." But in the case of *Hartford R. Co. v. Jackson*, 24 Conn. 514, a rate was named by an agent of a railroad, who understood the shipper to say that there were one hundred bundles of laths, when in fact the latter said five hundred bundles. It was held that the railroad company was not bound. In *Gulf C. & S. F. Ry. Co. v. Dawson* (Texas Civ. App.), 24 S. W. 566, where a shipper informed the agent of a railway company of the character of the fruit shipped, but the latter misunderstood him and quoted a rate under a mistake as to the character of the shipment, it was held that the parties did not assent to the same thing at the same time, so as to constitute a binding contract. See also *Rowland v. New York etc. R. Co.*, 61 Conn. 103, 23 Atl. 755.

This court has held, that in the transmission of a telegraphic message the telegraph company is the agent of the sender; and that if an offer is made by telegram, and, as delivered to the addressee, is materially different from the telegram delivered for transmission, and is accepted, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee. *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576; *Brooke v. Western Union Tel. Co.*, 119 Ga. 694. These decisions are based on the ground that the telegraph company is the agent of the sender in transmitting the message. If this be true of an independent company to whom a message is delivered for transmission, we can perceive no reason why the case would be different if the telegraphing were done by a company or operators under the control of the railroad, in transmitting a message to an agent who dealt directly with the plaintiffs. The evidence states that the telegram sent by Haile to Brinson was filed "in the railroad telegraph office" in Savannah, which we understand to mean a telegraph office under control of the railroad company. There is no doubt, as Mr. Justice Cobb points out in the *Flint River Lumber Company* case, that if the status of a telegraph company is to be considered from the standpoint of agency, some very strong reasoning can be adduced to sustain the

position that the minds of the parties never met, and that there was in fact no binding contract; and also that this falls within the rule that a special agent who is directed to communicate a particular message or do a particular thing has no authority to deliver another message or do some other thing so as to make a binding contract for his principal. Civil Code, § 3023. But we think that the telegraph cases above referred to in principle bear strongly on this point. And we must take position with the majority of the Supreme Court of North Carolina in the Borden case. If, however, the plaintiffs had known, or from all the circumstances should have known, that the rate quoted to them was a mistake, they could not have seized upon an evident mistake to take an unfair advantage of the other party. *Shelton v. Ellis*, 70 Ga. 297; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86. Courts can not relieve from bad contracts or hard bargains, where they have been deliberately made, and where there has been no fraud or deceit, and the terms of the contract are clear and unambiguous. If a man puts a low price upon his property and it is accepted, he can not escape from the contract on the ground that he ought to have charged more. This is not the character of mistake which furnishes a ground for relief in equity. *Alexander v. Herring*, 54 Ga. 200. Nor does mere ignorance of a fact by both parties do so. Civil Code, § 3985. Nevertheless the law of this State does recognize a difference between reforming a contract, and executing a contract in case of a mistake. To authorize a reformation of a contract on the ground of mistake, such mistake must be mutual; but the courts may decline to enforce the execution of a contract, if the mistake is confined to the party refusing, provided it is such a mistake as furnishes a good defense, and it can be corrected without injustice to the other party, and the party seeking the rescission or asserting the mistake has not been guilty of such negligence or laches as to prevent his doing so. On the subject of mistake as furnishing a basis for defense, or for equitable relief, see Civil Code, §§ 3535, 3660, 3981, 3982, 3983, 3984, 3985, 3974; *Stix v. Roulston*, 88 Ga. 743; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, supra; *Werner v. Rawson*, 89 Ga. 619; *Jossey v. R. Co.*, 109 Ga. 439, 447 (discussing the *Werner* case and section 3974 of the Civil Code); *Keeth v. Brewster*, 114 Ga. 176; *Atlanta Trust &*

Banking Co. v. Nelms, 116 Ga. 915, 923; *Comer v. Grannis*, 75 Ga. 277 (in which case rescission of an executed contract was denied); *DuBignon v. Mayor*, 106 Ga. 317; *Dyer v. Walton*, 79 Ga. 466.

If a binding contract was entered into between the plaintiff and the defendant, the latter could not rescind without the assent of the former. One party to a contract can not rescind it by mere notice to the other. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140. But rescission may be had by mutual consent. There was no express statement that the original contract should be rescinded or changed; but the evidence was conflicting as to what transpired and as to the conduct of the parties. If there was a valid, binding contract, but the parties consented to a correction so as to make it conform to the telegram sent, whether this would amount to a technical novation, with the requisites thereof, does not require decision at this time. The issues as to whether or not there was an acceptance and the making of a contract, and whether or not there was an assent to a rescission or change from the rate first quoted, were made by the plea. The question whether there was knowledge of the mistake on the part of the plaintiffs and an effort to seize on the mistake to take an unfair advantage was suggested in the briefs, but was not made in the plea filed.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

PRIESTER v. MELTON.

123	375
125	540
126	330

1. A writing purporting to contain an agreement to convey land, but which is so indefinite as to the description of the land that the same can not thereby be identified, is not, in the absence of extrinsic evidence showing the description applicable to a particular parcel of land, admissible in evidence as color of title.
2. In an action of ejectment there were three demises. The lessor in the first demise was dead, and his legal representative was not a party. The lessor in the second demise had conveyed all of his interest to the lessor in the third demise. *Held*, that the lessor in the second demise was a competent witness as to transactions and communications between him and the lessor in the first demise, on the trial of an issue between the lessor in the third demise and the tenant in possession.
3. When a plaintiff in ejectment seeks to recover on the prior possession of his predecessor in title, a prima facie case is not made out unless the

evidence shows prior possession of such predecessor and a deed from him to the plaintiff, or to some one under whom the plaintiff claims, while the grantor therein was in actual possession.

Submitted May 23, — Decided June 16, 1906.

Ejectment. Before Judge Mitchell. Lowndes superior court. November 24, 1904.

This was an action of ejectment in the common-law form. The plaintiff laid three demises, in the names of A. H. Smith, N. J. Priester, and Sophia Priester respectively. Thomas Melton was the tenant in possession. The case went to trial on the issue made by the plea of not guilty. The plaintiff introduced in evidence a deed from N. J. Priester to Sophia Priester, conveying the premises in dispute. The plaintiff also tendered in evidence a writing of which the following is a copy: "Georgia, Lowndes County. I have this day bargained to N. J. Priester 15 acres of land adjoining to my Griffin field and Mr. E. L. Moore's land, for which he is to pay \$125.00 within 3 years, and will receipt him for payments made. Jan. 14, 1891. A. H. Smith." The court, upon objection, rejected this evidence. The plaintiff then tendered in evidence a receipt signed by A. H. Smith, reciting the payment of sixty dollars by Nathan Priester. The court, upon objection, rejected this evidence. The plaintiff then introduced N. J. Priester as a witness, and offered to prove by him that "he had been living" on the land in dispute and "had been in the actual possession" for more than seven years, "had built a house and put other improvements thereon, and "had paid" to A. H. Smith the purchase-money for the land. Upon objection to the witness, on the ground that A. H. Smith was dead, the court refused to allow the witness to testify. No further evidence being offered, the court awarded a nonsuit; and to this ruling and the other rulings referred to the plaintiff excepted.

J. G. Cranford, for plaintiff.

Denmark, Ashley & Smith, for defendant.

COBB, J. The paper signed by A. H. Smith was offered as color of title, but we think it was properly rejected, as the description of the land therein was not, in the absence of extrinsic evidence showing that the description was capable of

application to a particular parcel of land, sufficient to identify any particular land. *Luttrell v. Whitehead*, 121 Ga. 699 (1).

2. It appeared that A. H. Smith was dead, that there was no demise in the name of his legal representative, and that N. J. Priester had conveyed all of his interest in the land in controversy to Sophia Priester. Hence there could be no recovery on the demise in the name of A. H. Smith, nor on that in the name of N. J. Priester. The case, therefore, was one in which Sophia Priester was the plaintiff and Melton was the defendant; and on the trial of the issue thus made, N. J. Priester was not, by the death of Smith, rendered an incompetent witness under any of the provisions of the Civil Code, § 5269.

3. The testimony of N. J. Priester, that he had been in possession of the premises in dispute, claiming them as his own, should have been admitted, but when admitted it did not make out a prima facie case in favor of Sophia Priester. The code declares that "a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever." Civil Code, § 5008. See also *Parker v. Railroad Co.*, 81 Ga. 392; *Bleckley v. White*, 98 Ga. 597 (3); *Ellis v. Dasher*, 101 Ga. 5; *Horton v. Murden*, 117 Ga. 73 (6, 7). While the section of the code, literally construed, would authorize a recovery only when the plaintiff proves prior possession in himself, the rule is broader than this. An heir or a devisee who has never been in possession may recover upon the prior possession under a bona fide claim of ownership of his ancestor or devisor at the time of his death, unless a better adverse title is shown by the defendant. *Wolfe v. Baxter*, 86 Ga. 705; *Brundage v. Bivens*, 105 Ga. 806; *Watkins v. Nugen*, 118 Ga. 375 (1). One who claims under an heir or devisee may recover on proof that the ancestor or devisor died in possession bona fide claiming ownership, unless the defendant shows a better adverse title by possession or otherwise. *Bagley v. Kennedy*, 85 Ga. 703. One who claims under another, who in turn claims under an executor's deed, may in like manner recover upon proof of possession of the testator at the time of his death. *Hadley v. Bean*, 53 Ga. 685. In all of the cases cited, in which the plaintiff was permitted to recover, not on his own prior posses-

sion, but on the prior possession of the person under whom he claimed, such person was either an ancestor or a deviser who died in possession, and therefore whatever title he may have had passed from him at the time he was an actual possessor. It would seem, upon principle, that one who claims under a deed from a living person, who was actually in possession at the time the deed was made, should be given the right to recover on the prior possession of his grantor to the same extent that an heir or devisee can recover on the prior possession of his ancestor or deviser. The right in all of such cases is given because the person so claiming the title is supposed to have acquired by descent, will, or deed, as the case may be, whatever rights would be drawn to the possession; and therefore, for any such right to be acquired by one, it must appear that he acquired it from a possessor. The possessor is allowed to recover upon his bare possession. He may bargain away this right. But one who claims under him, and asserts a right to recover upon his possession, must show that he acquired title either directly or indirectly from him while he was in actual possession. See, in this connection, the remarks of Judge Trippe in *Hadley v. Bean*, supra. If the evidence of N. J. Priester had been admitted, it would have shown possession in him at some time in the past, but it would not have shown that he was in possession at the time he made the deed to Sophia Priester. The plaintiff's case would, therefore, have failed even if the evidence had been admitted. There was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v. TALBOT.

1. A carrier acquires no right, by virtue of its employment as such, to hold goods delivered to it by a wrong-doer to whom they do not belong, until the charges are paid, against the claim of the true owner; nor has the carrier any lien on the goods for the transportation charges.
2. The Supreme Court will not pass on a question not made in the trial court. Thus, where the sole prayer of the petition is for injunction, and the defendant, without demurring, pleads to the merits and consents to a trial on the merits by the judge without a jury, he can not, after an adverse judgment,

for the first time raise the point in a direct bill of exceptions that the plaintiff has not pursued his proper remedy.

Argued May 23, — Decided June 16, 1905.

Equitable petition. Before Judge Mitchell. Lowndes superior court. November 22, 1904.

This case arose upon a petition brought by T. M. Talbot against the Savannah, Florida and Western Railway Company, to enjoin it from selling a certain mare under a claim of lien, as provided by the Civil Code, §§ 2303, 2304, for freight charges. The petition alleged, that the plaintiff is the owner of a certain dark bay mare of the value of \$300, which is held by the defendant; that the defendant is seeking to wrongfully sell the mare under the named sections of the code, under a claim of lien for the sum of \$74, freight charges; that said mare was wrongfully received by the defendant; that it was shipped by the plaintiff's direction from Rochester, N. Y., to his brother, H. Talbot, at Columbus, Ohio, under bill of lading, a copy of which is attached to the petition; that the mare arrived at Columbus, Ohio, in due or reasonable time; that without plaintiff's knowledge or consent, and without the knowledge or consent of the consignee, the mare was transported in some way from Columbus and got into the possession of the defendant, without the knowledge, authority, or consent of the plaintiff, the consignee, or any authorized agent of the plaintiff; that the transportation was entirely voluntary, and the defendant had no right to charge freight for such transportation; and had no lien on the mare for such charges; and that the defendant refuses to deliver the mare to petitioner or to refrain from selling the same under its alleged claim of lien. The prayer was for an injunction to restrain the sale, and to prevent the enforcement of the lien for freight charges. The defendant, in its answer, admitted the possession of the mare and that it was seeking to sell it under the Civil Code, §§ 2303, 2304, for the payment of its lien for freight charges in the sum of \$74.90. It averred, that it received the mare in the usual and ordinary business way from the Louisville and Nashville Railroad Company at Montgomery, Alabama, and transported it from Montgomery to Valdosta, Georgia, in good faith; that defendant's possession of the mare is a legal possession, because it was received in the ordinary and usual course of business and brought by the defendant to the

place of destination in good faith; that after reaching the destination the mare could not be delivered, and therefore the defendant is holding the same for its freight charges; that the mare was shipped from Cincinnati (?), Ohio, to Valdosta, Georgia, and a bill of lading was issued at Columbus, Ohio, to H. Talbot, and the mare was shipped to Valdosta by said H. Talbot; that defendant and its connecting lines transported the same according to the shipping contract; that when the mare reached Valdosta the consignee refused to accept the same and to pay the freight charges. The case came on to be tried on its merits before the judge of the superior court, without a jury, upon an agreed statement of facts and certain evidence which was introduced. It was agreed by the parties that on June 30, 1901, W. E. Foster delivered the mare to the New York Central and Hudson River Railroad Company, at Rochester, New York, to be transported to Columbus, Ohio, said railroad company accepting and delivering its bill of lading, the material parts of which are as follows:

"New York Central & Hudson River R. R. Co. Received, subject to the classification in effect on the date of issue of this bill of lading, at Rochester Station, July 30, 1901, from W. E. Foster, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to said destination, if on its road; otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

Marks: Consignee, H. Talbot. Destination, Columbus. Ohio.

Description of articles: 1 horse, ORR val. \$100, man in chg., Car D 22867. A. R. Laurence, Agent. (The signature of the Agent here acknowledges only the receipt of the property and the charges advanced, if any.)"

[On the other side.] "Not negotiable. If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 9 of the conditions of the Uniform Bill of Lading, on the back hereof." Among the conditions placed on the back of said bill of lading, which is headed, "New York Central & Hudson River R. R. Co. Uniform Bill of Lading Conditions," is the following: "Property not removed by the person or party entitled to receive it, within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier at the sole risk of the owner of said property, or may be at the option of the carrier removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges.

. . If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned (without any condition or limitation other than the name of the party to be notified on the arrival of the property), the surrender of this bill of lading properly endorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading. . . Owner or consignee shall pay freight at the rate herein stated and all other charges accruing on said property before delivery and according to weights as ascertained by any carrier hereunder."

It was further admitted, that the mare was transported under this bill of lading to Columbus, Ohio, but was not delivered to H. Talbot, the consignee, who lived there, but came on to Valdosta without his knowledge or consent, and that it is now at Valdosta, and is claimed by and is the property of the plaintiff. It was further agreed, that the defendant received the mare from the Louisville and Nashville Railroad Company at Montgomery, Alabama, in good faith and in the usual course of business; that the amount of advanced charges mentioned in the way-bill was paid by the defendant to its connecting lines; that the charge of \$15.32 by the defendant is a reasonable charge for the transport-

tation of the mare from Montgomery to Valdosta; and that the material parts of the way-bill are as follows: "Plant System of Railways. Collect way-bill. Way-bill series and No. LP 497, date, Aug. 5, 1901, LS & MS Car 22867. From Montgomery to Valdosta, Ga., via Alb. Consignor, L&N, Cinti. 258 8/2, 1901. Columbus, O., CCC&St.L. Consignee, H. Talbot, Valdosta. Articles, 1 Horse, Released. Weight, 2000, Class 2, Advanced charges, \$59.62, Freight \$15.32, Collect \$74.94." It was further agreed, that Leonard Johnson was the "man in charge" mentioned in the bill of lading; that he had the bill of lading in his possession and surrendered the same to the initial carrier at Columbus, Ohio, and directed that the mare be shipped to Valdosta; and that it was shipped under this direction. The plaintiff also introduced the following oral testimony. T. M. Talbot: "I know Leonard Johnson; on August 30, 1901, he was a half-grown negro boy, uncouth, fifteen or sixteen years old, such as we have around here on the streets; he did not have any business with the horse; he was put in charge of the horse, looking after it in the car and taking care of it. His duties were to feed and water the horse." On cross-examination he testified, that Leonard Johnson was in Rochester, New York, when the mare was shipped to Columbus, Ohio; that he did not know that Johnson was there; did not know whether he was dressed in broadcloth at the time he was put in charge of the mare; he had not seen him for three and a half months prior to that time and did not know what Johnson's duties were in reference to the mare, except what somebody else told him; he did not know what instructions or restrictions as to the management or control of the mare were placed upon Johnson by the person who put him in charge; neither did he know about what information was given to the Hudson River Railroad Company as to the boy's relation to the mare or as to the right or authority he had over it. The defendant introduced J. F. Passmore, who testified, that he knew Leonard Johnson; that he was at that time from twenty to twenty-five years old, and that in 1901 he looked like he would weigh 130 or 135 pounds, and that mentally he was a bright "fellow;" that he weighs now about 165 pounds; that he is a follower of race horses; that he did not know his business, but had seen him about the stables at the fair grounds; he would

lead the horses around, cooling them off after they had run their races; that he did not know that Johnson was exercising authority or ownership over any of the horses when he saw him thus engaged. Upon the agreed facts and the evidence introduced, the court rendered a judgment in favor of the plaintiff, granting a perpetual injunction against the defendant; to which judgment the defendant excepts, alleging that the judgment is contrary to law and without evidence to support it, for the reasons, (1) that the agreed statement of facts and the evidence submitted showed that the defendant, as a common carrier of freight, for hire, received the mare in good faith from its connecting road and while the mare was in the custody of Leonard Johnson, who had been placed in charge of the same by the consignor; (2) that the agreed statement of facts and the evidence showed that the plaintiff had a complete and adequate remedy at law by an action of trover against the defendant; (3) that the agreed statement of facts and the evidence showed that the defendant had neither done nor threatened to do any act which was illegal, nor was it guilty of any conduct which would authorize the granting of an injunction, but, on the contrary, it was only proceeding lawfully to collect freight charges which were due and which had been advanced to its connecting lines of carriers, and a proper freight charge which was due to the defendant as a common carrier for transporting the freight which it had received in good faith.

Kay, Bennet & Conyers and *Cranford & Walker*, for plaintiff in error. *W. H. Griffin* and *A. T. Woodward*, contra.

EVANS, J. (After stating the facts.) 1. The right of the railroad company to collect its transportation charges is dependent upon whether the person who started the shipment of the mare from Columbus to Valdosta had authority to direct such shipment. It is contended that Leonard Johnson, who was in charge of the mare when it left Rochester, New York, was clothed by the consignor with apparent authority to direct this shipment from Columbus to Valdosta. The bill of lading which the New York Central and Hudson River Railroad Company issued to Foster stated that there was a man in charge of the "horse."

This man was Leonard Johnson, and it is inferable from the evidence and the agreed statement of facts that he had no authority over the mare except to feed, water, and look after its general welfare while in transit. It is true that he had possession of the bill of lading, but that bill of lading authorized a delivery to the consignee without its production. It was the duty of the carrier to deliver the mare to the consignee, and it was liable for a delivery to any other person than the consignee named in the bill of lading or his authorized agent. When the mare arrived at Columbus it was not delivered to the consignee, Talbot, but, without his knowledge or authority or consent, was reshipped over the line of defendant's road and its connecting carriers. The delivery to Johnson at Columbus was wrongful, and Johnson's possession was that of a wrong-doer. He had no authority either to receive the mare or to continue the shipment from Columbus to Valdosta. His surrendering the bill of lading in his possession to the initial carrier at Columbus and directing that the mare be shipped to Valdosta was without the knowledge or consent of either the consignee or the owner. (A carrier acquires no right, by virtue of its employment as such, to hold the goods delivered to it by a wrong-doer to whom they do not belong, until the charges are paid, against the claim of the true owner; and therefore it has no lien upon them, but must, on demand, surrender them to the owner. Hutch. Car. § 491. This rule is based upon that universal principle that no one's property can be taken from him without his consent, expressed or implied. It is not a harsh rule as applied to common carriers, for the reason that the carrier has the right to demand of the consignor the transportation charges in advance. When a carrier receives goods for shipment from one who has neither title nor rightful possession, the true owner may reclaim his goods wherever found. The right of a connecting road is no better than that of the initial carrier, in the collection of its freight charges, even though it may have received the goods in good faith and without notice that the consignor's possession was wrongful and fraudulent. The liability in such case is on the principle that the true owner of personal property has the right to the possession of his property which has been fraudulently taken from him, even though it be found in the possession of an innocent purchaser. And in

such cases the true owner is not liable for any expenses to which the person in possession may have been put, either in the purchase of the property or otherwise.) The evidence in this case authorized the finding that the possession of Johnson, who started the shipment from Columbus to Valdosta, was tortious, and that the shipment was made without authority from either the consignee in Columbus, or the plaintiff, who resided in Valdosta. It follows, therefore, that the defendant is not entitled to its freight charges, however reasonable they may be, and that it has no lien therefor. It was not error for the court to permanently enjoin the collection of the charges by sale under the provisions of the code.

2. The plaintiff in error further contends that the judgment of the court is erroneous, for the reason that the evidence disclosed that the plaintiff had an adequate and complete remedy at law by an action of trover. If the defendant desired to avail itself of the objection that the owner had gone into a court of equity and invoked the aid of that court, when his remedy at law was complete, it should have done so by appropriate demurrer. It can not submit the determination of the case to a court of equity, and, after an adverse judgment, for the first time raise the point that the plaintiff has not pursued the proper remedy. The only prayer in the petition was for injunction. The only issue submitted to the court by the pleadings was whether, under the facts, the plaintiff was entitled to relief by injunction. The failure of the railroad company to demur at the proper time, and the trial of the case by the judge without a jury, amounted to a consent that the issue made by the pleadings should be determined in that manner; and it is now too late, after the case has been decided, to raise the question that the plaintiff's legal remedy was ample, and that there was therefore no necessity to invoke the extraordinary powers of a court of equity. See *Hay v. Collins*, 118 Ga. 247-8.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SELLERS *v.* SAVANNAH, FLORIDA AND WESTERN
RAILWAY COMPANY.

1. Inasmuch as the law imposes liability upon a common carrier when a delivery of freight is made by mistake to a person not entitled to receive the same, it is the right of the carrier to call upon an unknown person claiming a shipment to identify himself and establish his claim thereto; and where a bill of lading covering the shipment has been issued, the carrier may demand its production as a condition precedent to making delivery.
2. The charge of the court was in accord with the law as above announced, and fully and fairly presented to the jury the issues they were called on to determine, notwithstanding some slight verbal inaccuracy of expression.
3. Though the court, in passing upon a demurrer to the plaintiff's petition, may have erroneously held he was not entitled to recover punitive damages in the event he established his alleged cause of action, the error so committed does not constrain the ordering of another trial, the jury having found upon ample evidence that the defendant railway company had not committed any breach of its duty as a common carrier.

Submitted May 23, — Decided June 16, 1905.

Action for damages. Before Judge Mitchell. Echols superior court. November 21, 1904.

W. E. Thomas and *Wilcox & Johnson*, for plaintiff.

Kay, Bennet & Conyers and *R. G. Tison*, for defendant.

FISH, P. J. The plaintiff, Philip Sellers, purchased a bill of goods from a mercantile firm in Brunswick, Ga., and gave directions to have the goods shipped to him at Statenville, Ga. The goods duly arrived at that station over the line of the defendant railway company, and the plaintiff called upon the local agent to deliver them to him. They were marked with his initials, "P. S." The agent declined to make delivery to him. According to the testimony of the plaintiff, the reason assigned by the agent for refusing to do so was that he had not received the way-bill and did not know the amount of the freight charges, though he at the same time expressed some doubt as to the plaintiff being the consignee of the goods. The plaintiff had but recently established a place of business twenty-four miles from the station, was a stranger in the community, and was unknown to the agent. The plaintiff offered to deposit with the agent \$20 to cover the freight charges, but the agent declined to receive the money, saying it was against the orders of the company to deliver freight in the absence of a way-bill.

He further said he did not know the plaintiff nor whether he was "the party entitled to the goods or not, and didn't know whether the goods were shipped to order, notify, bill of lading attached, or not. That was the reason he gave [for refusing to make delivery], and the only one. The agent said he wanted to see the way-bill; he never mentioned the bill of lading at all." This occurred about the 23d or 24th of December. The plaintiff subsequently sent a neighbor, who was known to the agent, for the goods. The agent declined to deliver them, on the ground that he had not received the way-bill and did not know what the freight charges were, but promised to deliver the goods to the teamster of this neighbor as soon as the amount of the freight charges was ascertained. Acting in behalf of the plaintiff, this party again called for the goods, but was confronted with the same statement from the agent. No tender of the goods was ever made to the plaintiff until some ten months thereafter, when he declined to accept delivery, as the goods consisted of provisions and supplies and had greatly deteriorated in value. Upon this evidence the plaintiff relied as sustaining his complaint that the defendant company had been guilty of a conversion of the goods and was liable to account to him for the value of the same. In support of its defense that it had committed no breach of its public duty as a carrier, the company introduced as a witness its local agent, who testified substantially as follows: He had himself but recently gone to Statenville; and while he had seen the plaintiff once in the latter part of November, the plaintiff was unknown to him when he came to see about his goods. The plaintiff being a stranger to him, he asked for the bill of lading, not knowing whether or not the goods, which were simply marked "P. S.," belonged to him. The plaintiff replied that he did not have the bill of lading; whereupon the agent said that if he had the "purchase-bill" and it was marked paid, the goods would be delivered to him upon his paying five dollars. The agent thought the goods might have been shipped "to order, notify," and he knew that if they were so shipped, and he should deliver them to the wrong party, without requiring the production of the bill of lading, he would have to pay for the goods. Plaintiff did offer to pay the freight, but the agent had not received the way-bill and

did not know the amount of the charges. He found out, about January 7th, that the goods were intended for the plaintiff, and, on the same day he received this information, tendered the shipment to him; but the plaintiff refused to accept delivery, saying he had already instituted suit against the company. The agent had previously delivered freight to responsible persons whom he knew, without requiring them to produce a bill of lading. His reason for calling on the plaintiff to show a bill of lading was that the plaintiff was a stranger to him, and he did not know whether or not the plaintiff was the proper person to whom to deliver the shipment. The jury accepted the explanation given by the company's agent excusing his refusal to make delivery of the goods prior to January 7, and the court below declined to set aside the verdict which they returned in favor of the defendant.

1. Inasmuch as the law exacts of a common carrier of freight that it shall ascertain beyond question, before delivering goods to a person claiming the right to receive them, that he is the proper person to whom to make delivery, and puts upon the carrier the entire risk of making a mistake as to the identity of the consignee, it is but reasonable that the carrier should be permitted to exercise the right of calling on the consignee to establish his claim to the shipment. Hutch. Car. (2d ed.) §344. If the person who applies for the goods is not known to the carrier, and there is any doubt as to his right to receive them, the carrier "should require the most unquestionable proof of his identity." Ibid. And, to this end, "the carrier may properly require the production of the bill of lading by the consignee, as evidence of his right to demand delivery of the goods." Ibid. §423a. Accordingly it was held by this court in *Bass v. Glover*, 63 Ga. 745, that "A railroad company completing the transportation of freight, begun by other common carriers whose lines are connected with the railroad by an intermediate line or lines, may, for its own security, exact the production of the bill of lading before making delivery of the goods to the consignee." Failure to do so may, indeed, establish liability for an improper delivery to him. *Boatmen's Savings Bank v. Railroad Co.*, 81 Ga. 221. The company sued in the present case was not the initial carrier, and its local agent was not presumed to know what were the

terms of shipment, until he received the way-bill or a bill of lading was produced by the plaintiff. It is clear that if the agent's version of what occurred be true, the company was not liable, and the verdict was right and should be upheld.

2. The charge of the court was in accord with the law as above announced. Complaint is made, however, that the judge, in referring to the paper which the company contended its agent called on the plaintiff to produce as evidence of his right to demand delivery of the shipment, alluded to it as "the way-bill or bill of lading." The use of the term "way-bill," the plaintiff in error insists, was calculated to convey to the jury the idea that it was incumbent on the plaintiff to produce a paper which should have accompanied the shipment and should have been in the hands of the carrier, not in the possession of the consignee. The technical meaning of the term is doubtless that indicated by the plaintiff. See 2 Bouv. L. Dic. 1222; 30 Am. & Eng. Enc. L. (2d ed.) 440; *Peixotti v. McLaughlin*, 1 Strobh. L. (S. C.) 468, 47 Am. Dec. 563. But we do not think the jury could have been misled as to the meaning of the judge when he undertook to instruct them as to the right of the local agent to demand of the plaintiff the paper evidencing his claim to the shipment. The term "bill of lading" was not the precise technical word by which that paper could be accurately referred to, since, strictly speaking, the term is one to be applied only to the written evidence of a contract for the carriage and delivery of goods sent by sea, though it is now in common use in connection with the affreightment of goods by water other than the sea, or carriage by rail. See 4 Am. & Eng. Enc. L. (2d ed.) 509; 5 Cyc. 707; Cyc. L. Dic. 965. "Freight bill" or "freight receipt" was, perhaps, the most technically correct term to employ. *Ibid.*; *Hutch. Car.* (2d ed.) § 120. Still, a presiding judge may be accorded some latitude of expression, and it may well be presumed that an intelligent jury understood that which should be perfectly plain to a person of ordinary mental capacity.

Exception is also taken to the following excerpt from the charge of the court: "If you find from the evidence in this case that there was any delay in tendering the goods to the plaintiff, if they were tendered to him by the agent, . . . and that this delay was occasioned because the defendant's agent in good faith

had doubt as to whether the plaintiff was the person rightfully entitled to have the goods, . . . such delay would not constitute a conversion of the goods, . . . and would not render the defendant liable." This and another instruction along the same line are subjected to the criticism that the court, in so charging, "excluded from the consideration of the jury the necessity of a demand for the bill of lading by the agent of the company, and tended to convince them that doubt alone of the identity of the consignee and of his right to receive the goods would free the company from liability, in the absence of the demand." A reference to the full charge of the court, which appears in the record, discloses that these instructions were given to the jury while the judge was charging upon the right of a carrier, acting in good faith, to demand identification of a consignee, and that in another portion of the charge the judge submitted to the jury the question whether or not the agent did, by calling upon the plaintiff to produce the bill of lading, afford him an opportunity of thus identifying himself or showing his right to receive delivery. As the plaintiff did not pretend that he had a bill of lading, it was really not necessary for the company to prove a demand on him to produce it, and the charge given to the jury was as favorable to him as he had any right to expect. It would seem to be as much incumbent upon an unknown consignee to produce of his own volition a bill of lading, if he has one, as it is incumbent on a railway agent to make demand to see the bill of lading before making delivery of freight. Upon the consignee rests the burden of offering proof of his identity and establishing his right to receive the goods consigned to him. The real and controlling issue in the case was whether the agent had no reason for declining to make delivery other than that he did not know the precise amount of the freight charges, and arbitrarily and capriciously refused to accept a deposit which would fully cover the same, or in good faith declined to make delivery for the reason that the consignee was unknown to him and he doubted his right to claim the goods. Whether the agent did or did not demand a production of a bill of lading was unimportant, save as the truth in this regard went to illustrate his good faith in endeavoring to ascertain whether the plaintiff was the proper person to whom to make delivery.

3. The plaintiff in his petition alleged that the company's agent, with full knowledge of plaintiff's right to claim the goods, "wilfully, maliciously, impertinently, and disrespectfully, and without any reason whatever, refused to allow petitioner to have said goods;" and for this alleged wilful breach of the defendant's duty as a common carrier the plaintiff asserted the right to recover punitive damages, in addition to the value of the shipment. On demurrer to certain paragraphs of the plaintiff's petition, the court held that he was not entitled "to recover damages beyond the difference in the value of the goods shipped at the time they should have been delivered and at the time they were offered for delivery by the defendant company." Exception to this ruling was duly taken. Granting it was erroneous, no cause for ordering another trial of the case is made to appear. The plaintiff was afforded full opportunity to establish his alleged cause of action, being restricted in no way in making proof thereof, and the jury has found upon sufficient evidence that he is not entitled to recover in any amount. Had the court ruled that he was entitled to recover punitive as well as actual damages, if he established the alleged breach of duty on the part of the carrier, the result would have been the same, as he failed to satisfy the jury that this was in point of fact true.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

REDFEARN v. HINES.

The evidence demanded a finding in favor of the plaintiff on the issue raised by the plea to the jurisdiction.

Argued May 23, — Decided June 16, 1905.

Appeal. Before Judge Mitchell. Brooks superior court. December 9, 1904.

Hines sued Redfearn in Brooks county, and the defendant filed a plea to the jurisdiction, averring that he was a resident of Thomas county. The trial of this issue resulted in a finding against the plea, and a verdict was rendered against him on the merits of the case. The defendant made a motion for a new trial, which was overruled, and he excepted. The evi-

dence, taken most strongly for the defendant, showed that he was an unmarried man, with his mother and sister living with him, whom he referred to as his family; that he had lived in Thomas county, and about January 1, 1903, sold his home in Thomas county, and temporarily removed to Brooks county until he could build another home in Thomas county; that he always regarded Thomas county as his home, worked the roads there, and only removed to Brooks county until he could get his house built in Thomas county; that he taught school in various places; that his family had lived on his farm in Thomas county; that at the time the suit was brought he had sold his home in Thomas and had no home, and had moved his family to Brooks county, where he was keeping house with his mother and sister and teaching school; that he had taken the school census in Brooks county and also in Thomas; that he paid his poll tax in Thomas; and that the school that he was teaching was a county-line school, located in Brooks county, just across the line from Thomas, and was patronized by pupils from both counties. There was also evidence from others to the effect that Redfearn had claimed Thomas county as his home. The contract sued on was in writing, and stated that it was between Hines of Brooks county, "and R. L. Redfearn of Thomas."

Bennet & Bennet, for plaintiff in error.

L. W. Branch, contra.

COBB, J. The only question argued in this court was that of jurisdiction. Domicile is determined by act and intention. The evidence undoubtedly discloses an intention on the part of the defendant to make Thomas county his domicile. But the undisputed evidence as to his conduct is such as to clearly indicate that this intention has not been carried into effect. Even if the mother and sister of an unmarried man can be so far treated as his family as to authorize service upon him by leaving process at the place where they are found, these relatives of the defendant had been carried by him from Thomas county to Brooks county, and were there keeping house with him. He owned no home and had no family residing in Thomas county at the time the suit was brought. There would have been no

way under the law to have perfected service of process upon him in Thomas county. We think the evidence demanded a finding that he was domiciled in Brooks county at the time the suit was filed, and that therefore the suit was well brought in that county. This being so, if any errors were committed in charging on this issue, they were immaterial.

Judgment affirmed All the Justices concur, except Simmons, C. J., absent.

ATLANTIC AND BIRMINGHAM RAILWAY CO. v. OWENS.

1. A railroad company owes to one who comes to its passenger station to receive a friend or guest upon arrival ordinary care for his safety while at the station, and is liable for an injury resulting from the negligence of an employee in the handling of baggage.
2. The evidence authorized the verdict, and no reason appears for reversing the judgment overruling the motion for a new trial.

Argued May 23, — Decided June 16, 1905.

Action for damages. Before Judge Humphreys. City court of Moultrie. December 30, 1904.

Owens sued the railway company, alleging in his petition: Plaintiff went to defendant's passenger station in the city of Moultrie, to await the arrival of a friend upon one of the defendant's trains. As the train approached the station, and while the passengers were leaving it, plaintiff was standing on the platform of the depot immediately next to the train, and, while he was watching the passengers as they were coming out of the train, a porter of the defendant, employed to work about the depot and to assist in taking baggage from the trains of the defendant, brought a heavy trunk from the baggage-car of the train, and approaching that portion of the platform where plaintiff was standing, pitched the trunk violently and negligently in his direction and caused it to strike his left leg and foot and crush his foot, breaking several bones in the same. Plaintiff was not at fault. The petition contains allegations as to the plaintiff's age, suffering, and earning capacity, and prays damages in the sum of ten thousand dollars. The defendant filed a demurrer to the petition, on the following grounds: No cause of action is set forth. The

place where the plaintiff was standing when injured is not alleged with sufficient clearness, nor is it alleged why he was not in the waiting-room of the depot, nor is the alleged negligence of the defendant's servant sufficiently set forth. It appears from the petition that the plaintiff's injury was the result of a pure accident, and was the result of his own fault in placing himself in the way of the trunk and exposing himself to danger. The demurrer was overruled, and the defendant excepted *pendente lite*. The defendant filed an answer, in which it denied any liability for the acts complained of in the petition. The trial resulted in a verdict in favor of the plaintiff. The defendant moved for a new trial. The motion was overruled, and it excepted.

J. L. Sweat, J. H. Merrill, and J. A. Wilkes, for plaintiff in error. Shipp & Kline and W. A. Covington, contra.

COBB, J. 1. One who expressly or impliedly invites another upon his premises is bound to see that they are in such condition that the person invited may approach and remain thereon in safety. This rule applies to railroad companies. A person who enters the premises of a railroad company for the purpose of transacting business with its agent is lawfully upon the premises, and the company owes him a duty to keep the premises in safe condition. *Ga. R. Co. v. Richmond*, 98 *Ga.* 495. A railroad company owes a duty to keep its passenger station in safe condition, not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who may accompany others about to become passengers, or who resort there for the purpose of meeting incoming passengers. The company owes to one who goes to its station for the purpose of meeting an incoming passenger the same duty, in regard to the station and the conduct of its employees thereat, as it does to any person going there for the purpose of transacting business with an agent of the company. While such a person is not a passenger, the company owes to him ordinary care for his safety, and will be liable to him if he is injured as a result of ordinary neglect on the part of the agent or servants of the company. See 1 *Fetter on Carriers of Passengers*, § 237; *Ray's Neg. Imposed Duties (Passenger Carriers)*, 6, 7; 26 *Am. & Eng. Enc. L.* (2d ed.) 510; 6

Cyc. 610; *Macon R. Co. v. Moore*, 108 Ga. 84; *Sullivan v. R. Co.*, 39 La. Ann. 800, s. c. 4 Am. St. Rep. 239; *McKone v. R. Co.*, 51 Mich. 601, s. c. 7 Am. Rep. 596; *Tobin v. R. Co.*, 59 Me. 183, s. c. 8 Am. Dec. 415; notes to *Little Rock Ry. Co. v. Lawton*, 29 Am. St. Rep. 54. Applying these rules, there was no error in overruling the demurrer.

2. It appears from the evidence, that a minister of the gospel was boarding at the plaintiff's house; that the minister was expecting a young lady organist to arrive on the train, and requested the plaintiff to go with him to the station to meet this young lady, asking that he would take charge of her upon her arrival; that the two went to the station to await the arrival of the train; that the plaintiff was standing upon a portion of the platform where it was usual for persons upon business similar to that which carried the plaintiff to the station to stand; and that while on the platform he was injured by a trunk falling upon his foot. The evidence amply justified a finding that this trunk was handled in a negligent manner; and that there was nothing to place the plaintiff upon notice that it would be so handled. Taking the evidence most favorably for the plaintiff, a finding in his favor was amply warranted. It was argued that as the young lady was the friend of the minister, the duty of safety on the part of the company might be owing to him, but would not extend to his friend, the plaintiff. We think that under the evidence the jury were authorized to find that the plaintiff was the one who really went to the station for the purpose of taking charge of the passenger, and that therefore the duty was owing to him. But there is authority for the proposition that a carrier of passengers owes a duty not only to a friend of an incoming passenger who goes there to assist the passenger, but also to a person who accompanies such friend on this mission. See *Langston v. Board of Land and Works*, 6 Vict. Law Rep. 316, cited in a note to 1 *Fetter on Carriers of Passengers*, § 237. There was no error requiring a reversal of the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

STRICKLAND v. HUTCHINSON.

1. Where the entire description of land sold, as contained in a bond for title, was "333 acres of land in the southeast corner of lot of land No. 416 in the 11th district of Lowndes county," the number of acres was of the essence of the description; and if it developed that in fact the land delivered by the obligor to the obligee contained only 225 acres, the latter was entitled to a reduction in the price accordingly. This was not such a sale by the tract or entire body as is contemplated in the Civil Code, § 3542.
2. No point was raised or decided in the trial court as to the sufficiency of the description contained in the bond. Moreover, the plaintiff was suing the defendant upon a note given for the purchase-money of the land covered by the bond.
3. A party to a suit is not entitled to a new trial because of an error in his favor.
4. In an equitable proceeding the jury may recommend to the court the assessment of costs upon the respective parties, but are not authorized to determine against which party they shall be taxed. The presiding judge is to determine this, in the use of a sound discretion.
5. Where the verdict of the jury in an equitable action found in favor of one of the parties, and added that each party pay one half of the costs of suit, and no special exception was taken to that part of the verdict, or reference made to it in the brief of counsel, this court will treat it as being a mere recommendation to the presiding judge, which he may or may not follow in his discretion.

Argued May 24, — Decided June 16, 1905.

Complaint. Before Judge Mitchell. Thomas superior court. January 6, 1905.

Strickland brought suit against Hutchinson on a promissory note for \$261. The defendant pleaded that the note sued on was one of several given for the purchase-money of certain land; that he bought the land of the plaintiff for the sum of \$1,250 and gave his notes therefor, taking a bond for title; that the land which the plaintiff contracted to sell him was 333 acres in the southeast corner of lot of land No. 416 of the 11th district of Lowndes county; that he paid all of the notes except the one now sued on; that the plaintiff represented that the tract of land contained 333 acres, and this was of the essence of the contract; that he went into possession and made improvements; that he became doubtful as to the quantity of the land, and approached the plaintiff in reference to it, but the latter assured him that he would warrant every acre that he had represented it to contain, and thereupon the defendant paid the note then due; but upon a survey it was dis-

covered that the land contained only 225 acres. The defendant therefore prayed for a finding that he was not liable on the note sued upon, that he should recover the amount already paid in excess of what he should have paid after apportioning the price according to the correct acreage, and that the plaintiff be required to convey the property to him, and the purchase-price be declared paid. On the trial the jury found, "that the land mentioned should be the property of the defendant without further payment, and that each party pay one half of the costs of suit." The plaintiff moved for a new trial, the motion was overruled, and he excepted.

O. M. Smith and W. H. Griffin, for plaintiff.

W. E. Thomas and J. M. Johnson, for defendant.

LUMPKIN, J. (After stating the foregoing facts.) 1, 2. In the view we take of this case, it is unnecessary to discuss the various grounds of the motion for a new trial at length. The bond for title which the plaintiff made to the defendant described the land as follows: "333 acres of land in the southeast corner of lot of land No. 416 in the 11th district of Lowndes county." This is the entire description contained in the bond as set out in the record. If a sale of land is by the tract or entire body, in the absence of fraud a deficiency in the quantity sold can not be apportioned. Civil Code, § 3542. A sale "by the tract or entire body," as the words are used in this section, means where a tract or body of land is sold as such, and not at so much per acre according to the acres which it may contain. Thus if a tract of land should be described in a bond for title by metes and bounds, or by some descriptive name or designation which would describe it as a whole, and the number of acres should merely be stated as an additional description, this would be a sale by the tract or entire body. *Turner v. Rives*, 75 Ga. 606; *Walker v. Bryant*, 112 Ga. 412. In the present case, however, the sole description of the land contained in the bond for title is 333 acres in the southeast corner of a named land lot. There is no other description by name, metes and bounds, or otherwise. If the number of acres be stricken from the description, no description whatever is left. The quantity is not only of the essence of the description but it is the whole description, except being in the southeast corner of a certain

land lot. In *Gress Lumber Co. v. Coody*, 94 Ga. 519, it was said that a deed which conveyed a specified number of acres on the north side of a lot of land described by its number, district, and county, the lot being by statute a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot, parallel with its northern boundary, so as to cut off a stated number of acres. This appears to have proceeded on the idea that presumptively the grantor intended to convey land in the shape of a parallelogram. But if so, the number of acres was of the very essence of the description, since without regard to it no cross line could be located. See also *Vaughn v. Fitzgerald*, 112 Ga. 517; *Huntress v. Portwood*, 116 Ga. 351. It is not sufficient to say that the parol evidence indicated that some tract containing less than the number of acres stated was intended. The bond for title was the written contract, and under its terms the obligee was entitled to 333 acres. There is no controversy that he did not receive that much, or that plaintiff was not prepared to convey that much to him. We think, under the facts of this case, that the defendant was entitled to have the deficiency apportioned, and that the verdict in his favor to that effect was demanded by the evidence. It is suggested that, considering the size of land lots as laid out in accordance with law in the 11th district of Lowndes county, it was impossible for 333 acres of land to have been contained in the southeast quarter of land lot number 416, and that the defendant must have known this. The bond for title does not say that the land was in the southeast quarter or one fourth of the land lot, but in "the southeast corner" of it. Owing to the fact that in this State there are several different sizes of land lots authorized by different acts of the legislature, and that, on account of differences and inaccuracies in surveys, land lots as laid out do not always accurately correspond in the quantity of land contained within their boundaries with that prescribed by law, judicial cognizance in regard to them has its limitations. This court may take judicial notice of the number of acres which a certain statute required to be put into a land lot, but it is not prepared to hold that a "corner" of a land lot necessarily means a quarter of it, or indeed how large a corner of a lot is. Besides, if 333 acres could not be

contained in the corner of the land lot, neither could 225 acres, considering the size of land lots in that county, four hundred and ninety acres each.

It is argued in the brief of counsel for plaintiff in error that the description contained in the bond for title is so vague and indefinite as to be void. But no such point as this appears to have been made or passed on in the superior court. Nor indeed is a plaintiff who brings suit to recover for the purchase-money of land in a very good position to contend that the bond for title given by him is void.

3. The plaintiff further asserts, that, if the contention of the defendant were true, he would be entitled to a deduction from the purchase-money of more than \$400, instead of the amount of the note sued on. But it furnishes no ground of complaint on the part of the plaintiff that the jury found too little for the defendant.

4, 5. At law, costs are to be taxed against the losing party. In equitable proceedings it is the duty of the presiding judge to determine who shall pay the costs; and in doing so he should use a sound discretion. *Guernsey v. Phinizy*, 113 Ga. 898. The jury have no power to determine conclusively who shall pay the costs, but in equitable proceedings they may recommend to the court the assessment of costs upon the respective parties. The determination of the matter, however, rests with the judge. Civil Code, § 4850. Here the defendant by his plea asked and obtained equitable relief; and while the jury had no power to conclusively find that each party should pay half of the costs, yet as verdicts are to be given a reasonable intendment, and as no special assignment of error was made on this point of the finding, we will construe it as being intended as a recommendation to the presiding judge, which did not bind him, but left him free to exercise his discretion in taxing the costs.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

McMULLEN *et al.* v. CITIZENS BANK.

- FISH, P. J. 1. "In all applications for a new trial the opposite party shall be served with a copy of the rule nisi, unless such copy is waived." Civil Code, § 5475; *Smedley v. Williams*, 112 Ga. 114.
2. Such service is essential though the application is to be heard during the term at which the trial is had. The intimation to the contrary in *Baldwin v. Daniel*, 69 Ga. 782, disapproved.
3. Where a rule nisi was granted on a motion for a new trial and ordered served, and the motion set to be heard at an adjourned term of the court at which it was made, to be held more than eighty days after the date of the rule, the court did not, at least, abuse its discretion in dismissing the motion for want of service, there being no excuse for failure of service, nor any evidence of waiver.
- Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.*

Submitted May 24, — Decided June 16, 1905.

Motion for new trial. Before Judge Mitchell. Colquitt superior court. January 12, 1905.

E. L. Bryan and W. C. McCall, for plaintiffs.

Humphreys & Humphreys, for defendant.

WOLFF *et al.* v. SAMPSON.

1. As between grantor and grantee, the strict rule of the common law prevails, that, in the absence of an agreement to the contrary, all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance of the freehold.
2. The evidence authorized a finding that all of the articles which were removed, except the gas fixtures, were upon the premises at the time the plaintiff's vendor acquired title from the defendants, and that there was no agreement reserving title to such articles. The defendants therefore had no right, as tenants under the plaintiff, to remove those articles, but did have the right to remove the gas fixtures, as they were placed in the building during their tenancy under the plaintiff's vendor.
3. The judgment will be affirmed, upon condition that the plaintiff write off from the verdict the value of the gas fixtures, as indicated in the opinion.

Argued May 24, — Decided June 16, 1905.

Trover. Before Judge Mitchell. Thomas superior court. January 6, 1905.

Sampson brought an action against Charles and S. M. Wolff to recover possession of eight pine store counters, "one low down syphon water-closet," and fixtures consisting of water pipe, lead

123	400
Case 1	
124	150
123	400
Case 2	
128	450

and screws, seven gas fixtures and chandeliers, one lot of pine partitions, and pine office railings and posts, all alleged to be of the value of \$318.50. The defendants answered, denying title in the plaintiff and setting up title in themselves. The trial resulted in a verdict in favor of the plaintiff for the sum of \$225. The defendants made a motion for a new trial, which being overruled, they excepted. For the other facts see the opinion.

J. H. Merrill, for plaintiffs in error.

Theodore Titus and *J. F. Mitchell*, contra.

COBB, J. The motion for a new trial consisted of the general grounds and mere amplifications of the same. There is no assignment of error on any ruling of the judge during the progress of the case. Under such circumstances, if there was evidence to support any theory which would justify a finding in favor of the plaintiff, this court will not interfere with the discretion of the judge in refusing to grant a new trial. The defendants were the owners of a storehouse which they sold to Rachel Wolff, who in turn sold to the plaintiff. There is no abstract of the deeds in the brief of evidence, but it is to be inferred from what appears therein that the deeds contained nothing more than the usual covenants in deeds of bargain and sale. After the sale to Rachel Wolff the defendants became her tenants, and continued as tenants of Sampson after his purchase. It distinctly appears that the gas fixtures were placed in the store by the defendants during the tenancy under Rachel Wolff. There is some confusion in the evidence as to the time the other articles were placed in the store, but there is evidence to authorize a finding that they were placed therein by the defendants prior to the sale to Rachel Wolff, one of the defendants testifying: "The partitions, necessary counters, and shelving and water-closet were in there when I sold to Rachel Wolff, and were still there when she sold to the plaintiff." The articles were removed from the store by the defendants before the expiration of their tenancy under the plaintiff. The plaintiff claims that he derived title to the property in controversy under his deed from Rachel Wolff. The defendants claim that these articles were mere trade fixtures, which they had a right to remove during their term. The evidence shows that the partitions, office railing, water-closet, and gas fixtures were at-

tached to the building in the way that such articles are usually attached to buildings in which they are situated. It does not appear that the counters were attached either by nails or screws, but they were of such a character as to be suited to the building and the business that was expected to be carried on therein by any one who occupied the same.

Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that it can not be removed therefrom, depends upon the circumstances under which the article was placed upon the realty, the uses to which it is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty. The general rule of the common law was that articles attached to the realty become a part thereof; but there was an exception to this rule in the case of trade fixtures. *Charleston Ry. Co. v. Hughes*, 105 Ga. 1, 23 (4); *Wright v. DuBignon*, 114 Ga. 765 (1). There was also an exception in the case of domestic fixtures which were placed upon the property by a tenant not engaged in any trade, but merely for the more convenient use of the premises during the term, and which were of such a character as to indicate that it was not the intention of the tenant that such articles should become a part of the freehold. *Wright v. DuBignon*, 114 Ga. 765 (2). The rule in reference to trade fixtures is applicable in cases of landlord and tenant, or where the occupant is in for a limited time; but it generally has no application whatever between a grantor and grantee. Mr. Bronson, in his work on Fixtures, says: "As between grantor and grantee, the strict rule of the common law obtains, and the general rule, in the absence of any agreement between the parties to the contrary, undoubtedly is that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance of the freehold. As between these parties, there is a strict observance of old common-law principles as to fixtures, and the courts have shown an unwillingness to extend the exceptions to the general rule granted to tenants in cases of fixtures between landlord and tenant. In this respect there is an apparently good reason why the courts should maintain that attitude; for the grantor, before the conveyance of his freehold, is the owner of all his fixtures, as well as the realty to which they are attached.

He knows what the law is, and it is in his power to make the fixtures personalty before sale of the premises, either by a severance or by an agreement in the instrument of conveyance duly reserving them to himself." Bronson on Fixtures, § 44. "The fact that articles attached to the premises have been devoted to purposes of trade, domestic convenience, or ornament does not thereby entitle the grantor to remove the same. The exception to the general rule in favor of this class of fixtures is not operative as between grantor and grantee." Bronson on Fixtures, § 47. See also 13 Am. & Eng. Enc. Law (2d ed.), 662 et seq. The grantor might, before surrendering possession, be allowed to remove domestic fixtures which could be detached with little or no injury to the freehold, when he would not be allowed to remove trade fixtures under similar circumstances. The owner of a place of trade is generally not permitted to remove trade fixtures adapted to the purpose for which the building was constructed, in the absence of an agreement to that effect, entered into at the time of the sale. In the absence of such an agreement, the fixtures will pass under the instrument which conveys title to the realty. The right to remove annexed articles as personalty may be reserved in the instrument conveying title to the realty, or by an agreement extrinsic and collateral.

It has been held, however, that a parol reservation of fixtures, made by the grantor before or at the time of the conveyance, is ineffective, for the reason that parol contemporaneous evidence is inadmissible to vary the terms of a valid written contract. Bronson on Fixtures, 266. However, in *Richards v. Gilbert*, 116 Ga. 382, a parol agreement seems to have been treated as sufficient. But the question as to whether the agreement should have been in writing was not directly passed upon in that case, the parol evidence having been admitted without objection. The articles in controversy, other than the gas fixtures, being upon the premises at the time of the sale to Rachel Wolff, and being either actually or constructively attached to the building, and all of them being adapted to the use for which the building was constructed, became the property of Rachel Wolff under her deed from the defendants, unless there was an agreement to the contrary between her and them. The burden was upon the defendants to show such an agreement; and, for the purposes of this

case, treating a parol agreement as sufficient, the evidence was of such a character as to authorize the jury to find that there was no such agreement. One of the defendants stated in his testimony that he did not sell these fixtures to Rachel Wolff; but taking the evidence as a whole, the jury could properly infer that this was merely a conclusion of his that title to the fixtures did not pass under the deed. If Rachel Wolff became the owner of the fixtures, and her title never became divested prior to the sale to the plaintiff, then under her deed to him he acquired title to such of the fixtures as were on the property at the time Rachel Wolff acquired title. We think the jury could find, from the evidence, in favor of the plaintiff, so far as the articles other than the gas fixtures were concerned. Gas fixtures, being easily removable and generally without any injury whatever to the freehold, and being merely the substitute for lamps or candle-stands, which were always personalty and removable, may be removed by a tenant, in the absence of a stipulation to the contrary. *Bronson on Fixtures*, § 53, p. 258. See also *McCall v. Walker*; 71 Ga. 290. The defendants had a right to remove the gas fixtures, but the removal of the other articles was unauthorized. The judgment will be affirmed, on condition that the plaintiff will, within ten days from the time the remittitur is filed in the office of the clerk of the trial court, write off from the verdict the sum of \$21, which being done, the judgment shall stand affirmed. If this be not done the judgment shall be reversed. The costs of this writ of error in either event are to be taxed against the defendant in error.

Judgment affirmed, on condition. All the Justices concur, except Simmons, C. J., absent.

JOHNSON v. ÆTNA INSURANCE COMPANY.

1. Where a policy of fire insurance contained a stipulation that it should be void "if the subject of insurance be a building on ground not owned by the insured in fee simple," but at the time the application for insurance was made the company, through its agent, knew that the applicant did not own the land on which the building sought to be insured was situated, it will not be heard, in defense to an action on the policy, to set up the non-compliance of the plaintiff with this condition of the contract.
2. Limitations in an insurance policy upon the authority of the agent of the

company to waive the conditions of the contract of insurance are to be treated as referring to waivers made subsequently to the issuance of the policy. *Mechanics Ins. Co. v. Mutual Bldg. Asso'n*, 98 Ga. 266, approved and reaffirmed.

Argued May 24, — Decided June 16, 1905.

Action on insurance policy. Before Judge Mitchell. Colquitt superior court. January 11, 1905.

Humphreys & Humphreys, Park & Payton, and *Z. D. Harrison*, for plaintiff.

T. H. Parker and *Shipp & Kline*, for defendant.

CANDLER, J. This was an action on a policy of fire insurance. The court below sustained a demurrer to the plaintiff's petition, and he excepted. From the petition as amended it appeared that one of the conditions of the policy was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if . . . the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The policy also provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto. And as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any provision or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." The building insured belonged to the plaintiff, but the land on which it was situated did not. It was alleged, however, that when he made application for insurance he expressly informed the agent of the defendant company as to the character of his ownership of the property sought to be insured; "that when he [plaintiff] signed said application, in answer to the question as to the ownership of the land neither 'no' nor 'yes' was written in said application;" and "if said question was answered in the affirmative, . . . it was inserted after petitioner had signed said application, without his knowledge, consent, or authority;" and

that "said application was signed at the request of the agent of defendant company, who filled out the answers to all questions that were filled out." It will be seen that the controlling question for decision is whether, under the allegations of the petition as amended, the defendant, by reason of the knowledge of its agent as to the real character of the plaintiff's ownership of the property, is estopped to defend on the ground of the plaintiff's non-compliance with the conditions of the contract of insurance, or whether the plaintiff, by accepting the policy on those conditions, and with notice of the limitation on the power of the agent to make a waiver for the company, is precluded from recovering on the policy. There is no principle of law more firmly established than that, in general, the knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputable to the principal; and this principle has uniformly been applied by our court in actions on contracts of insurance. *Carrugi v. Atlantic Ins. Co.*, 40 Ga. 135; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Greenwich Ins. Co. v. Sabotnick*, 91 Ga. 719; *Swain v. Macon Ins. Co.*, 102 Ga. 96. It has also been held that where a policy contained a stipulation identical with the one in the present case, limiting the power of any agent of the company to make a waiver for the company, and providing that any waiver, to be valid, must be endorsed in writing on the policy, the insured can not in an action on the policy excuse his failure to comply with the conditions of the contract. *Lippman v. Ætna Ins. Co.*, 108 Ga. 391, 120 Ga. 247; *Reese v. Fidelity Life Asso.*, 111 Ga. 482; *Mutual Life Ins. Co. v. Clancy*, 111 Ga. 865; *Mutual Reserve Asso. v. Stephens*, 115 Ga. 192. In the *Lippman* case the policy provided that it should be void "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy;" and the plaintiff sought to set up a waiver of this condition by showing that, subsequently to the issuance of the policy, an agent of the company had given him oral permission to procure other insurance on the property. In the *Reese*, *Clancy*, and *Stephens* cases, which were actions on policies of life insurance, the waiver sought to be set up was as to a provision that the policy should not become binding

upon the company until the first premium had been paid during the good health of the insured. Unquestionably, as to a matter concerning the time when the contract is to become of force, or as to the waiver of the conditions of the policy subsequently to its issuance, the insured, by accepting the policy, would be bound by its terms, and could not set up a waiver which he was bound to know the company's agent had no power to make. But that is not this case. Here the insured made written application for a policy of fire insurance. Upon being asked the question as to the character of his ownership of the property, he frankly informed the agent with whom he was dealing that he owned the building but did not own the land. There is no intimation in the petition that the insured was on notice, before receiving the policy, that the agent had no power to write the insurance with the title to the property held as it was. There is nothing from which an inference can be drawn that the agent and the insured colluded to defraud the insurance company by concealing the truth as to the ownership of the property. On the contrary, the pleader is emphatic in his declaration of his entire good faith and candor throughout the transaction. The knowledge of the agent being imputable to the company, and the company having, notwithstanding the provision of the policy that it should be void if the building was situated on land not owned by the insured in fee simple, entered into a contract with the plaintiff with its eyes open as to his ownership of the property, should it not be estopped, in a suit on the policy, to take advantage of a fact which it well knew when the contract was executed? To answer this question in the negative, it seems to us, would be to permit one party to a contract to receive all the benefits of the instrument, with full knowledge on his part from the beginning that it could not be enforced against him, and refuse absolutely to perform any of the conditions imposed by the contract upon him. To state such a proposition is to demonstrate its entire lack of equity.

Two cases are relied on by counsel for the insurance company, as opposed to the view which is now announced. In *Thornton v. Travelers Ins. Co.*, 116 Ga. 122, it was held that "where in a policy of insurance there is an express stipulation that 'no agent has power to waive any condition of this policy,' the insured by

an acceptance of the policy is estopped from relying upon any agreement made with an agent, having the effect of waiving one of the conditions enumerated in the policy." In that case the policy provided that the insurance should not cover injuries or death resulting wholly or in part, directly or indirectly, from hernia; and it appeared that the plaintiff told the agent of the company to whom the application for the policy was made, at the time of making the application, that he had hernia, and that the agent told him that it was not necessary to state that in his application — that the company did not require it. There is possibly a shadowy distinction between that case and the case at bar, on the idea that in the *Thornton* case the plaintiff colluded with the agent to defraud the company by concealing from it the fact that he had hernia, while in the present case there was nothing in the petition as amended to indicate that the plaintiff was guilty of either actual or constructive fraud. The writer confesses that he does not derive much comfort from this distinction, and candidly asserts his belief that the *Thornton* case is wrong, in that it applies the doctrine of estoppel to the wrong party to the contract. The decision in the case cited is based upon the authority of the case of *Porter v. Home Friendly Society*, 114 Ga. 937, which decided, in effect, that where a life-insurance policy contained a stipulation that "no agent has authority in any manner . . . to make, alter, or discharge contracts," the beneficiary was not entitled to maintain an action against the company on the theory that one of its agents had an agreement with the beneficiary to the effect that if the latter would pay the premiums, etc., for a specified number of years, the amount of the policy would then be paid to her. We fail to see how the *Porter* case can be deemed authority for the ruling in the *Thornton* case; for in the former the plaintiff sought to set up an entirely different contract from the one evidenced by the insurance policy, which of course could not be done; while in the latter the plaintiff sued strictly on the contract set out in the policy, but sought to show a waiver by the company of one of its conditions. The case of *Butler v. Standard Guaranty Co.*, 122 Ga. 371, is not in point, for in that case the court did not consider the question of the right of the defendant to set up the failure of the plaintiff to comply with the conditions of the contract. The plaintiff there

sought to rescind the contract on the ground that she was induced to sign it by reason of representations of the defendant's agent not embodied in the contract; and it appeared that the plaintiff was on notice that no agent had power to bind the company by any statement not contained in the contract. The case of *Thornton v. Travelers Ins. Co.*, supra, is, so far as we know, the only Georgia case which goes to the extent of holding that where the insurance company is on notice, at the time of entering into the contract, that the insured has not complied with some of the conditions of the policy, and yet with that knowledge issues the policy to him, it will be heard to defend on the ground of such non-compliance with the conditions; and it is in direct conflict with the earlier case of *Mechanics Ins. Co. v. Mutual Bldg. Assn.*, 98 Ga. 262, which, however, together with the cases of *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, and *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, we are asked to review and overrule. So far as appears from the report, the *Clay* and *Searles* cases did not involve any question as to the effect upon the plaintiff's rights of a stipulation in the policy limiting the power of an agent of the company to waive the conditions of the policy; and as they do not stand in the way of the contentions of counsel, it will be unnecessary to review them. The first case mentioned, however, had to do with a policy containing a stipulation as to waiver, almost identical with the one in the present case; and it follows that if that case is reaffirmed, the *Thornton* case must yield to it as authority. In the case in 98 Ga., the court, Mr. Chief Justice Simmons delivering the opinion, said (p. 266): "'Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered;' and limitations therein upon the authority of the agent to waive such conditions, otherwise than in writing attached to or indorsed upon the policy, are treated as referring to waivers made subsequently to the issuance of the policy." Citing 1 May, Ins. § 143, and authorities there cited.

The language quoted fits the present case like a glove; and upon the soundness of the principle announced must depend the decision of this case. A careful study convinces us that the logic of that case is unanswerable. An insurance company re-

ceives an application for a policy. One of the rules of the company is that insurance will not be issued upon a building situated on land not owned by applicant. But the company, through its agent, knows that the applicant owns the building which he wishes to have insured, but does not own the land on which it is situated; and with this knowledge nevertheless issues a policy on the building. Certainly, after leading the applicant to believe that he would be protected, and receiving from him the premiums charged for the insurance, it should not in good conscience be heard to set up, in defense to an action on the policy, that the ownership of the building and of the land were in different persons. True, the policy states on its face that no agent has the power to waive any of the conditions of the policy, and that none of them will be deemed to have been waived unless such waiver is attached to or endorsed upon the policy in writing. But this is not a question of waiver, so much as of notice and estoppel. The agent's knowledge, as has been seen, is the company's knowledge. In spite of the assertion in the policy that the contract shall be void if the ownership of the property is of a given character, the policy has been issued with notice to the company that the ownership is of that character. Regardless of any question of waiver, then, the company has placed itself in a position where it would be inequitable to allow it to make the defense which it seeks. "Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. . . Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud." Ostrander, Fire Ins. § 366. As to matters arising subsequently to the issuance of the policy, the case wears a different aspect. The contract is then made, and both parties are on notice as to its terms. The insured is bound to know what are the rights of the company, and that none of them can be relinquished save in the manner pointed out in the policy; and he, on his part, will not be heard to urge a waiver by the company, unless it has been made in the manner required. Our conclusion is that the ruling in the case of *Mechanics Ins. Co. v.*

Mutual Bldg. Asso'n, 98 Ga. 262, is sound; that it is controlling of the case at bar; and that anything to the contrary in the case of *Thornton v. Travelers Ins. Co.*, 116 Ga. 122, must yield as authority to the earlier case.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

COBB, J., concurring. There is an irreconcilable conflict between the cases of *Mechanics Ins. Co., v. Mut. Bldg. Asso.*, 98 Ga. 262, and *Thornton v. Travelers Ins. Co.* 116 Ga. 122; and therefore the ruling in the former case must control, unless it is reviewed and overruled. That case was not called to the attention of the court when the decision in the *Thornton* case was rendered. The case in the 98th Ga. was decided upon authority, and it must be conceded that it is abundantly supported. The ruling in the *Thornton* case seems, however, to the writer to be the better view, although candor requires an admission that there is little authority in support of it. As the other members of the court do not think that the case in the 98th Ga. should be overruled, the writer concurs in the judgment upon the authority of that case, being bound thereby. I am authorized to say that Mr. Presiding Justice Fish agrees with this view.

DUVALL v. BROGDEN.

FISH, P. J. 1. "No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff, would have been a final disposition of the cause, or final as to some material party thereto." Civil Code, § 5526. Where a case was carried to the superior court by certiorari, the answer of the justice of the peace traversed, verdict rendered against the traverse, and a motion for new trial made and overruled, a writ of error did not lie, as the main case was still pending, and it would not have been finally disposed of had a new trial been granted. *Brakelow Steamship Company v. West*, 121 Ga. 104.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 25, — Decided June 16, 1905.

Motion to dismiss the writ of error.

Buie & Knight, Levi O'Steen, and B. T. Allen, for plaintiff.

R. A. Hendricks, for defendant.

GOLUCKE v. LOWNDES COUNTY.

1. A party may not, in one suit growing out of a single transaction, maintain an action for damages for the alleged breach of a written contract of employment, and also sue for the value of services rendered "regardless of the contract."
2. Treating the suit as one for damages for the breach of a contract, and reading the contract declared on in connection with the allegations of the petition, the plaintiff did not allege with sufficient definiteness a fulfillment by him of the obligations imposed by the writing, or show with the legal certainty required the amount in which it was alleged he had been damaged.

Argued May 26,—Decided June 16, 1905.

Complaint. Before Judge Griffin. City court of Valdosta. February 4, 1905.

Felder & Rountree, A. G. Golucke, Cranford & Walker, and Moore & Pomeroy, for plaintiff.

Denmark, Ashley & Smith, for defendant.

CANDLER, J. The County of Lowndes, through its board of county commissioners, entered into a contract with J. W. Golucke & Company (the firm name of the plaintiff in error), of which the following are the material parts: "We have this day employed Messrs. J. W. Golucke & Co., of Atlanta, Ga., as architects for a county court-house for Lowndes County, located at Valdosta, Ga. They are to prepare full plans, specifications, and detail drawings, and furnish supervision to inspect the work, not exceeding twenty visits during its construction, and for said services we agree to pay them the sum of five per cent., and their expenses to amount of \$200, on total cost of said building when fully completed and furnished. We also agree to pay them two per cent. of their fee when plans and specifications are completed and delivered, two per cent. when contract is let, and balance in equal installments as estimates are given contractors." According to the petition, the cost of the building was to be \$50,000. It was also alleged, that in accordance with the contract, the plaintiff submitted plans, which were adopted by the county, and he was ordered to proceed to make working plans, detail drawings, and specifications, so that bidders might intelligently estimate and bid on the cost of erecting the building; that he complied with these orders and submitted the plans, specifications,

and drawings required, which were accepted by the board of county commissioners, and he was thereupon paid \$1,000 as the first instalment on the contract. He alleged that subsequently, at a meeting of the board of commissioners, the publication of a notice was authorized, inviting bids for the construction of the court-house building under his plans; that a number of bids were submitted, all of which were rejected; and that the county commissioners decided to postpone further action, advising plaintiff that he would be notified when the county would advertise for other bids. From time to time the plaintiff wrote to the chairman of the county board, asking when the county would be ready to proceed with the construction of the building, but received no definite reply to his inquiries. In July, 1903, nearly three years after the execution of the contract heretofore set out, the plaintiff was advised by the chairman of the board of county commissioners that the county would not use the plans furnished by him; and later he learned that the county had secured plans and specifications from another architect. The plaintiff alleged that he was at all times ready and willing to comply with his part of the contract, and expected to do so up to the time he received the letter advising him that his plans would not be used. He alleged also that in January, 1901, on the day on which the letting of the contract was advertised to take place, he went to Valdosta for the purpose of co-operating with the board of county commissioners in the letting of the contract, incurring an expense of \$20, which was authorized by his contract; and that the cost of supervision and other matters required of him under the contract would not have exceeded \$100, "leaving a balance due petitioner, under the terms of said contract, of \$1,420, besides interest, . . . which is past due and unpaid." "Petitioner further shows, that, regardless of the price fixed by said contract, the services and work rendered and performed by your petitioner to and for the defendant and duly approved and accepted by the defendant . . . were and are of the reasonable value of \$1,420, in addition to the amount already received by him." To this petition the county filed a demurrer, which the court sustained, and the plaintiff excepted. The demurrer contained twenty grounds, many of which were repetitions of each other. We will therefore not attempt to pass on the various grounds seriatim,

but will consider only such as, in our opinion, have a material bearing on the case.

1. Clearly the plaintiff could not maintain in one action a suit on the contract and "regardless of the contract," as he sought to do. There can be no doubt, however, that he intended to declare on the contract, as he does not contend that he did anything, except in accordance with its terms, which would entitle him to recover. We will therefore treat the action as a suit on a contract.

2. The contract sued on is quite vague in its terms; but reading it together with the petition, it appears that the plaintiff undertook to design a court-house building to cost \$50,000, and to supervise the work of construction. For this he was to be paid five per cent. of the total cost of the building when completed and furnished. Looking alone to the contract, it would seem that he was to be paid two per cent. *of his fee* when the plans were accepted, two per cent. when the contract for the building was let, and ninety-six per cent. in equal installments as estimates were given contractors; but in the light of the petition it is presumable that the intention of the parties was that he was to be paid two per cent. of the cost of the building, or forty per cent. of his fee, when the plans were accepted, etc. At all events, he has already been paid forty per cent. of his fee, taking the total cost of the building at \$50,000 as a basis. What part of the fee was intended to remunerate him for making plans and drawings, and what for supervising the construction, does not appear, nor does it appear that the plans submitted by the plaintiff called for a building which could be constructed for \$50,000. True, the contract is silent as to the cost of the building contemplated, but the plaintiff in his petition supplied that omission; and consequently, in passing upon the sufficiency of the petition, a provision to that effect is to be read into the contract. We think it is clear that the plaintiff has failed to allege with sufficient definiteness a performance by him of his part of the contract, or to show with legal certainty the amount in which he has been damaged by the alleged breach by the defendant.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

TIPPINS v. PHILLIPS.

Neither specific performance nor damages for its breach will be decreed in an action on a written option to purchase land, where the land is so vaguely described that the writing furnishes no key to its identification.

Submitted May 25, — Decided June 16, 1905.

Equitable petition. Before Judge Roberts. Telfair superior court. October 17, 1904.

J. U. Tippins brought suit against D. W. Phillips, alleging, that on June 22, 1904, Phillips sold to petitioner a certain tract of land lying in the 1403d G. M. district of Tattnall county, containing 424 acres, having boundaries as specified in the petition and being known as the "D. W. Phillips tract of land," which he had obtained from his father's estate; that Phillips also sold petitioner his share of the crops then growing on said tract. It was further alleged that the contract of sale was in writing, as follows:

"State of Georgia, Telfair County.

Lumber City, Ga., June 22, 1904.

"For and in consideration of the sum of \$5.00 to me in hand paid, and receipt of which is hereby acknowledged, I have granted to Mr. J. U. Tippins a 30-days option on 424 acres of land in Tattnall County. The price of said land, if taken in the limit of this option, is to be \$1,100.00, said price to also include my share of the crops now growing on the said land. In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written.

"In presence of:

R. C. Holaday,

C. E. Sikes.

D. W. Phillips [L. S.]

J. U. Tippins [L. S.]"

Plaintiff alleged, that, within the time limit of the option, he tendered to the defendant \$1,100 in cash, and that at the time of the tender the defendant refused to accept the same. He further charged, that D. W. Phillips then admitted the execution and delivery of the option, but refused to comply with its conditions, merely offering to return the five dollars received as earnest money to bind the contract; that on August 6, 1904, the defendant verbally sold to petitioner two other tracts of land adjoining each other and the 424-acre tract, for ten dollars per acre; and as

evidence of such contract petitioner attached to his petition the following letter:

"Lumber City, Ga., July 21, 1904.

"Mr. J. U. Tippins, Altamaha, Ga.

"Dear Sir,—I would like you to make me an offer on Mrs. McLeod's little place; there are 160 acres in the tract. If you will pay her the worth of it, you certainly will have no trouble in securing a deed to my property. You may not have any trouble to get it any way; as I told you the other day while up here that I meant to do the clean thing, and expected to do it, but that I would make no deed until I made some investigation as to certain matters in your neighborhood. Now I will soon go down there, but can't say for certain that I will get off next week, but will say that it will not be later than ten or twelve days; but if can arrange with my people, will try to be there by the middle of next week. If you don't care, make me an offer in writing; you can think the matter over, and if you are in a notion for it, we will see what can be done when I go down. If you feel like it, you can answer this letter. Yours truly, D. W. Phillips."

Petitioner alleged a continuous tender of \$1,100 for the lot of land mentioned in the option, and of the price named for the adjoining tracts; and that the value of the 424-acre tract is \$2,968. He prayed judgment for the difference between \$1,100 and \$2,968, unless defendant would make him a good and sufficient title to the 424 acres of land. The defendant demurred to the petition, on the grounds, that the alleged option was not sufficiently definite and certain in its terms and in its description of the land to authorize the court to require a specific performance by the defendant; that the alleged parol contract as to the tracts adjoining the 424-acre tract was void, because it was not in writing; and that the option contract was void for uncertainty and indefiniteness, and the allegations of the petition were insufficient to authorize a decree for specific performance, or damages for the breach of the contract. The court sustained the demurrer, and the plaintiff excepts.

W. T. Burkhalter and *James K. Hines*, for plaintiff.

B. M. Frizzelle and *E. D. Graham*, for defendant.

EVANS, J. (After stating the facts.) In order to recover dam-

ages in lieu of specific performance, it is essential that a case for specific performance be made out. *Prater v. Sears*, 77 Ga. 28. Was the contract sufficiently certain as to the subject-matter to authorize a court of equity to decree specific performance? The statute of frauds requires all contracts for the sale of land or any interest therein to be in writing, signed by the party to be charged therewith or some person by him lawfully authorized. Civil Code, § 2613, par. 4. Every essential element of the sale must be expressed in the writing, to meet the statutory requirement. One of the essentials is that the land must be so described that it is capable of identification. While it is not necessary that the land be described with such precision that its location and identity are apparent from the description alone, yet the description must be sufficiently clear to indicate with reasonable certainty the land intended to be conveyed. Parol evidence can not be invoked in aid of a vague and uncertain description, but is available, under the maxim *id certum est quod certum reddi potest*, to show the application of a description which itself furnishes a means of identification. If the land is so imperfectly and indefinitely described in the writing that no particular tract or lot is designated, parol evidence is not admissible to supply a description. *Douglass v. Bunn*, 110 Ga. 159. The land described in the writing is "424 acres in Tattnall county." Nothing could be more indefinite than this description; not the slightest key is furnished to locate the land. It is not even as specific as the description in *Gatins v. Angier*, 104 Ga. 386. There the land was described as "a certain piece of land described as follows: commencing about one hundred (100) feet from the land-lot line on Mayson & Turner's road and extending along said road four hundred and twenty (420) feet and running back a uniform width to the Sims land;" and this description was held to be so indefinite and vague as to render it impossible to identify any particular land. There is a distinction between a vague and an ambiguous description. In the latter case parol evidence is admissible to explain the ambiguity. It was on this principle that the court, in *Mohr v. Dillon*, 80 Ga. 572, allowed parol proof to show that the hundred acres referred to in the auctioneer's memorandum were bounded in a certain way. The question in that case was whether the memorandum as to who was the purchaser and who was the vendor, and as to the land

itself, was ambiguous on its face; and the court held that it was. As to insufficient description in deeds, see *Luttrell v. Whitehead*, 121 Ga. 699; *Crawford v. Verner*, 122 Ga. 814.

But it is insisted that the clause, "The price of said land, if taken in the limit of this option, is to be \$1,100.00, said price to also include my share of the crops now growing on the said land," serves to point out a definite and certain tract of land in Tattnall county upon which D. W. Phillips had a share in a crop. For aught that the writing discloses, there may be other lots of land in which Phillips had an interest in the crops. After all, it would be first necessary to locate the land to find the crops, and the writing does not identify the land. The salutary rule that contracts for the sale of land must be in writing would be practically abrogated if courts were to allow the parties to supply by parol a description to the land, when the writing contains no descriptive words indicating any particular land. Neither does the letter attached to the petition supply the deficiency in the description in the option. The letter was written about a month after the execution of the option, and makes no reference to the option. The connection of the two writings can not be shown by parol evidence. *North v. Mendel*, 73 Ga. 400. There is no prayer in the petition either for specific performance of the parol contract in reference to the two tracts adjoining the tract of 424 acres, or for damages resulting from the breach of the contract; hence it is unnecessary to decide whether the letter attached to the petition was sufficiently certain to prove the subsequent sale by parol of these two tracts. The written agreement on which the suit is based is void for lack of sufficient description of the land, and there was no error in sustaining the demurrer which pointed out this vital defect in the petition.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

MITCHELL v. SCHMIDT.

1. Under the facts of this case there was no error in refusing to recommit it to the auditor.
2. Where a case was referred to an auditor, exceptions were taken to his report, a trial was had thereon, and the case was brought to this court,

where it was held that there was nothing in the pleadings which raised an issue as to whether there had been a misappropriation of payments made by a debtor to a creditor holding more than one claim, and the point was not decided by the auditor, on the return of the case to the superior court a motion on the part of the defendant to file a plea raising that issue was properly overruled.

3. Where this court ruled that a certain issue was not made by the pleadings in a case, and that the judge of the trial court should have instructed the jury not to consider that question, on a second trial there was no error in not submitting to the jury an exception to an auditor's report which in substance raised the same question.
4. There was no error in directing a verdict in favor of the plaintiff.

Argued May 25, — Decided June 16, 1905.

Foreclosure of mortgage. Before Judge Parker. Wilcox superior court. September 20, 1904.

Schmidt commenced a proceeding against Mitchell, in Wilcox superior court, to foreclose a mortgage. The defendant answered, showing cause against the foreclosure. The case will be found reported in 117 Ga. 6. The answer of the defendant is there sufficiently set out, except certain allegations and a prayer substantially as follows: Plaintiff and defendant have had large dealings for a number of years, and it is impossible for this defendant to set out an itemized statement of all said dealings, but they consisted of the shipment by defendant to plaintiff of quantities of timber and lumber which plaintiff bought from defendant according to measurement in Darien, where plaintiff resided; and after paying charges against such shipments, the balance should have been applied to such note and mortgage; and defendant has reason to believe that, upon a proper accounting, said plaintiff is indebted to him in a large sum. The ascertainment of the true status of accounts between the parties will require the investigation of numerous transactions and long and complicated accounts. "Wherefore defendant prays that said plaintiff be required to come to an accounting with this defendant, in order that the true indebtedness of said plaintiff to this defendant may be ascertained; and that upon the same being ascertained, the defendant may have judgment thereof." By amendment it was alleged that the defendant had made numerous payments by shipments of rafts of timber which were accepted by plaintiff at their cash value in Darien, and were to be credited on the note and mortgage sought to be foreclosed. An itemized

statement of the dates of receipt of the rafts by the plaintiff, the number of them, and the amount of cash value of each raft was set out as an exhibit. Defendant prayed for judgment against the plaintiff for the amount of excess of the payments over and above the note and mortgage. After the judgment on the first trial had been reversed and the case returned to the superior court, the defendant moved to recommit it to the auditor, in order that he might get the benefit of a plea of misappropriation of payments. This motion was overruled. He then tendered an amendment to his plea, setting up this defense. It was rejected. The defendant did not insist upon any of the exceptions to the auditor's report, except two, numbered respectively 10 and 13. 'On motion of the plaintiff the court directed a verdict in his favor. Defendant excepted.

Haygood & Cutts, for plaintiff in error.

Hal Lawson, contra.

LUMPKIN, J. (After stating the foregoing facts.) 1. There was no error in refusing the motion to recommit this case to the auditor. If it was not too late to make the motion, and if the presiding judge had a discretionary power in regard to it, he did not err in refusing it. On the subject of recommitting to an auditor, see *Littleton v. Patton*, 112 Ga. 438, (5); *Fleetwood v. Bibb*, 113 Ga. 618; *Sanford v. Tanner*, 114 Ga. 1006, 1015; *Cureton v. Cureton*, 120 Ga. 563.

2. It was determined by this court, when the case was previously before it, that there was nothing in the pleadings which raised the issue whether or not there had been a misappropriation of payments. But on that subject the jury could only inquire whether the demand to which the payments had been applied was correct, just, and due at the time they were made. When the case came on for trial after this ruling, it was sought to amend the pleadings by setting up, as a defense, misappropriation of payments. This the court rightly refused to allow. In *Cureton v. Cureton*, 120 Ga. 560, it was held that "An amendment to the pleadings, raising new and distinct issues, is not allowable after the filing of an auditor's report. But an amendment of a pleading to conform to the evidence submitted before the auditor without objection, and which does not raise any new issue, is permis-

sible." In that case it appears that evidence was introduced before the auditor without objection, on the subject of whether the demand of Cureton, one of the parties, was stale. He reported that Cureton, by his own delay and laches, lost his right to enforce contribution, and his demand was barred by the statute of limitations; but inasmuch as no plea of the statute of limitations had been filed, the auditor recommended that the pleadings so be amended as to set up this defense, and, when so amended, that such claim of Cureton be held barred by the statute. This court held, that, under such circumstances, the amendment was properly allowed. Mr. Justice Evans, delivering the opinion, said distinctly that "An amendment to pleadings setting up new and distinct issues is not allowable after the filing of an auditor's report. . . The matter to which the amendment related was involved in the original issue, and no new issue was raised." In the case at bar, as already noted, it has been distinctly held that there was no issue of misappropriation of payments made in the case as heard before the auditor. Therefore to file a plea to that effect now would be to raise a new and distinct issue. It was never intended, by what was said in *Cureton v. Cureton*, that if, in the course of an investigation before an auditor, some evidence should find its way into the record touching a point which was not in issue, after his report had been filed and a trial had, on exceptions to it one of the parties could so amend his pleadings as to set up a new and distinct issue based upon such casual statements or pieces of evidence. To allow this would be, as Mr. Justice Evans said, "to make trials interminable." On a hearing before an auditor many things may be said casually by witnesses, which are not objected to, or as to which there is no cross-examination, because they do not apply to any issue on trial and are considered of little or no consequence. To allow a party to proceed until he fails before the auditor, and then to file an entirely new plea based on such evidence, might work grave injustice or necessitate a reopening of the entire litigation. If there had been a misappropriation of payments to an older debt, the defendant must have known it before the auditor made his report.

3. The 13th exception merely seeks to have this same point submitted to the jury; which the defendant was not entitled to have done. The bill of exceptions stated that none of the ex-

ceptions to the auditor's report were insisted on at the last trial, except those numbered 10 and 13. Exception No. 13 has been disposed of by what has been said.

4. Exception No. 10 alleges error in the auditor's finding of fact which is numbered "5" in his report, on the ground that, to reach the conclusion therein stated, the auditor charged the defendant with interest on the mortgage debt at the rate of eight per cent. per annum, while it is contended that the evidence showed that subsequently to the date of the mortgage an agreement was reached whereby the defendant was not to be charged with any interest whatever, and that this was based on a valuable consideration and was binding. The auditor's finding of fact which is numbered "5," and to which this exception is directed, is as follows: "There was due and unpaid on said note on the 20th day of September, 1895, the sum of \$1,396.44, and nothing has been paid on it since that date. There is now due said sum of \$1,396.44, and interest on the same at eight per cent. per annum from said 20th day of September, 1895." Immediately following this finding in the auditor's report occurs finding of fact No. 6, which is as follows: "The items of interest included in the statements of account rendered by plaintiff and by Smith and Wylly to defendant, after October 30, 1891, were the interest on said note, and no other interest was charged. The agreement between plaintiff and defendant that no interest should be charged did not apply to said note." To this finding no exception was taken, or at least none is now insisted on or contained in the present record. Therefore it stands as being unexcepted to and conclusive. If the agreement to charge no interest did not apply to the note, then it follows, as matter of course, that in estimating the amount due on the note interest would be calculated at the rate stated in it. And therefore the exception to the finding numbered "5," standing alone, is without merit. It is contended by plaintiff in error that this case was one at common law, and not in equity, and therefore that exceptions of fact should have been submitted to the jury; or that, if it should be treated as an equitable proceeding, having already been submitted once to the jury it could not afterwards be withdrawn from their consideration by the presiding judge. It is immaterial whether either of

these positions be correct or not. The presiding judge did not strike or dismiss the exception, but directed a verdict, holding, in effect, that there could be but one finding by the jury. In this we concur with the judge. One exception being covered by the former ruling of this court, and the other point being concluded by a finding unexcepted to, and also being without merit, there was but one possible finding. Moreover, it was held, when this case was formerly here, that "The general rule is, that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will not be held to be independent of one another; and a failure of one party to perform on his part will exonerate the other from liability to perform."

The plaintiff testified that the defendant did not deliver the timber as he agreed. In the brief of the defendant's evidence accompanying the auditor's report occurs the following statement: "When I applied for last advancement I told Mr. Schmidt that I expected to have a good deal of dealings with him. He declined to advance me money, and that stopped me. I could not go on without help, and his refusal to help me further placed me where I had to stop. (Objection to this evidence—no evidence to support it.) My recollection is I wrote him I could not go on because he would not advance balance of the five hundred dollars agreed on." Accompanying the auditor's report in the record, and apparently forming a part of it, is a statement of his rulings on the evidence. One of these is that "Plaintiff objects to defendant's testimony that he stopped sawing timber for plaintiff because the latter refused to make him further advances, on the ground that there is nothing in defendant's plea to support this evidence. Sustained, and evidence ruled out." As to considering this ruling, see *Tifton Ry. Co. v. Chastain*, 122 Ga. 250.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

ATLANTIC & BIRMINGHAM RAILWAY COMPANY v. SMITH & SON.

CANDLER, J. 1. The evidence for the plaintiffs showed that the animal for the killing of which suit was brought was killed by the running and operation of the defendant's train; and the presumption arose that the defendant was negligent.

2. Some of the evidence offered by the defendant tended to show that its employees in charge of the train exercised due care to avoid the injury; but the engineer was not produced, and the evidence of the fireman, on account of the length of time intervening between the occurrence and the trial, was very uncertain, there being a failure on his part to recall with any degree of positiveness anything done by any member of the train crew to prevent the killing. From other witnesses there was some slight evidence tending to show that due diligence was not observed. The jury trying the issues of fact took this view of the evidence, the judge of the superior court, upon certiorari, sustained their finding, and this court will not reverse the judgment overruling the certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 25, — Decided June 16, 1905.

Certiorari. Before Judge Roberts. Irwin superior court. October 28, 1904.

J. L. Sweat and Haygood & Cutts, for plaintiff in error.

L. Kennedy, contra.

MOORE *et al.* v. MOBLEY *et al.*

1. A deed to land, made in fraud of the rights of creditors, is not void ab initio, but is only voidable at the instance of the creditors; and such a deed conveys title as against any one not affected by the fraud.
2. This court will not reverse a judgment overruling a motion for a new trial on the ground of error in the refusal of the trial court to allow stated questions asked, when it does not appear from the motion that the trial judge was informed what the answer to the questions would be.
3. It was not error to charge, in effect, that if a party goes into possession of land under a parol purchase and afterwards surrenders the land without ever having paid any of the purchase-money, his possession will not inure to his benefit as against the one from whom he purchased.

Argued May 25, — Decided June 16, 1905.

Equitable petition. Before Judge Roberts. Irwin superior court. December 31, 1904.

Haygood & Cutts, Hal Lawson, and E. D. Graham, for plaintiffs, cited Ga. R. 44/573; 46/553; 50/629; 54/451; 70/809; 101/160; 59/256; Civil Code, §§ 3584, 3589.

McDonald & Quincey, for defendants.

CANDLER, J. 1. The Civil Code, § 3584, provides that "possession to be the foundation of a prescription. . . must not have originated in fraud." The principal question for decision in this

case is whether the fraud contemplated by the section quoted is restricted to fraud against the true owner of the land, or extends to any fraudulent scheme which may have been effectuated by the transfer of possession. In the case at bar the question arises in the following manner: The plaintiffs sued the defendants in ejectment, relying on a chain of title originating in a grant from the State. The defendants met the plaintiffs case by evidence to the effect that they and their predecessors in title had been in possession of the land for more than seven years under color of title. To offset this defense the plaintiffs sought to prove that the original deed relied upon as color of title was made for the purpose of defrauding the grantor's creditors, the grantee being a party to the fraud. The plaintiffs did not claim under the creditors, nor were they affected by the alleged fraud. The court below excluded the evidence offered, and ruled that the deed, if fraudulent for the reasons urged, could only be attacked by creditors of the grantor.

The exact question presented, so far as it relates to the law of ejectment, has never, to our knowledge, been passed upon in this State. Our reports abound in decisions defining color of title, and laying down rules as to what sort or degree of fraud is necessary to render invalid a paper relied upon as color of title; but we have not been cited to any case in which this court had before it the question whether the fraud contemplated by the code section is limited to the true owner of the land. A careful study of all the authorities indirectly bearing upon the subject, however, convinces us that the ruling of the trial judge was correct, and that the evidence sought to be introduced was properly excluded. It needs no citation of authority to establish the proposition that in Georgia a deed made in fraud of the rights of creditors is not *ab initio* void, but is only voidable at the instance of the creditors affected by the conveyance. If the creditors do not interfere to assert their rights, title will pass; and this is true though the grantee have full notice of the fraudulent purpose of the deed and be a party to the furtherance of the scheme. If, therefore, such a deed is good as a conveyance of title as against all the world except those who are affected by the fraud, we are at a loss to see how a plaintiff in ejectment, who was not in any sense affected by the fraud

on the creditors, and who does not claim under them, can take advantage of a flaw in the title, which by law is available only to creditors, to defeat the defendant's claim to prescription. In *Street v. Collier*, 118 Ga. 470, it was held: "Color of title is anything in writing connected with the title which serves to define the extent of the claim. It matters not how imperfect or defective the writing may be, considered as a conveyance, if there is a writing which defines the extent of the claim." Certainly the paper relied upon by the defendants in the present case comes within the broad definition which we have quoted. It may be conceded that it was made in fraud of creditors, but the fact remains that this fraud was only fraud as to those whom it affected. As to all others the deed, so far as the purposes for which it was made is concerned, was a valid conveyance of title. If this reasoning is correct, it follows that the court below did not err in excluding the evidence offered.

2. The foregoing disposes of those grounds of the motion for a new trial which complain of the exclusion of evidence tending to show that the deed referred to was executed in fraud of creditors, and that the court erred in charging in accordance with the principles which we have mentioned. Certain other grounds of the motion complain of the refusal of the court to allow given questions to be asked, but do not disclose what answers would have been made to the questions so propounded. Others still fail to make it appear that the court was informed as to what the witness would answer. Under the ruling of this court in *Griffin v. Henderson*, 117 Ga. 382, these grounds can not be considered by this court.

3. Nor was it error for the court to charge, in effect, that if a party goes into possession under a parol purchase without paying any of the purchase-money, and afterwards surrenders the land, his possession will not inure to his benefit as against the one from whom the parol purchase was made. See *Brown v. Huey*, 103 Ga. 448.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Fish, P. J., disqualified.

O'BRIEN v. FLETCHER.

123	427
Case 1	
129	674

LUMPKIN, J. 1. Where a deed was executed in 1887, record of it was not necessary in order for it to operate as color of title so that possession of a part of the tract of land covered by it would extend constructively to the limits of the lot or known tract described in it. *Roberson v. Downing Co.*, 120 Ga. 838, and citations.

The verdict was supported by the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 25,—Decided June 16, 1905.

Ejectment. Before Judge Roberts. Irwin superior court. December 28, 1904.

E. D. Graham, by *Z. D. Harrison*, for plaintiff.

L. Kennedy and *W. L. Grice & Sons*, for defendants.

LITTLEJOHN v. STELLS.

1. The General Assembly may, by express enactment, authorize the corporate authorities of municipalities to provide by ordinance for the punishment of an act which in its nature affects the health, peace, and good order of the community, notwithstanding that such an act has already been made penal under the general law of the State.
2. An ordinance passed in pursuance of such authority does not provide for the punishment of an offense against the laws of the State, and one arraigned in a municipal court for a violation of such ordinance is not entitled to a trial by jury.
3. The act of 1903 (Acts 1903, p. 96), which confers upon the corporate authorities of the cities of this State the power to provide by ordinance for the punishment of selling liquor on Sunday, limits the punishment to be inflicted to fine and imprisonment. A sentence under an ordinance passed under the authority of such act, providing that the accused shall work upon the city chain-gang, is without authority.
4. Direction is given that the applicant be taken from the city chain-gang and carried before the mayor's court of the city, in order that a legal sentence may be imposed upon him.

123	427
Case 2	
123	508
123	427
Case 3	
d124	3
124	307
124	718

Argued May 25,—Decided June 17, 1905.

Habeas corpus. Before Judge Gober. Cobb superior court. March 25, 1905.

Littlejohn applied for a writ of habeas corpus, to be directed to Stells, alleging that the latter was holding him in custody in violation of law. At the hearing it appeared that the applicant

had been arraigned in the police court of the City of Marietta, charged with selling liquor on Sunday in violation of an ordinance of which the following is a copy: "Be it ordained by the City Council of Marietta, that from and after the passage of this ordinance it shall be unlawful for any person to sell in any quantity, directly or indirectly, any spirituous, malt, vinous, or intoxicating liquors of any character within the corporate limits of the City of Marietta from twelve o'clock on Saturday night until twelve o'clock on Sunday night. Any person violating this ordinance, upon conviction thereof, shall be fined by the mayor not exceeding \$300, or imprisonment not longer than three months, or both at the discretion of the mayor." This ordinance was adopted in pursuance of authority conferred in an act approved August 15, 1903 (Acts 1903, p. 96), of which the following is a copy: "Be it enacted by the General Assembly of Georgia, that from and after the passage of this act it shall and may be lawful for the corporate authorities of each city in this State to pass ordinances prohibiting any person within the corporate or jurisdictional limits of such city from selling in any quantity, directly or indirectly, any spirituous, vinous, malt, or intoxicating liquors of any character, from 12 o'clock Saturday night to 12 o'clock Sunday night, and the corporate authorities of such cities are further empowered in such ordinances to provide that any person or persons violating any of the provisions of such ordinances shall, on conviction thereof before the police court of such city, whether known as mayor's or recorder's court, or otherwise designated, be subject and liable, as punishment for each and every such offense, to a fine of not more than \$300 and to imprisonment not exceeding three months, either or both, at the discretion of the officer presiding in such police or other municipal court; and to further provide in such ordinances, that the aforesaid penalties shall not affect the power of the mayor or corporate authorities of such city to revoke the license of any barroom or tippling-house." The validity of both act and ordinance was attacked upon various grounds. The judge remanded the applicant to the custody of the respondent, and the applicant excepted.

H. B. Moss, for plaintiff.

D. W. Blair and *J. E. Mozley*, for defendant.

COBB, J. 1, 2. It is well settled that a municipal corporation can not by ordinance provide for the punishment of an act which constitutes a criminal offense under the general law of the State, in the absence of express legislative authority conferring this power upon the municipality. *Moran v. Atlanta*, 102 Ga. 840. Prior to the adoption of the present constitution the General Assembly could confer this power upon municipalities either by general or special law. *Hood v. Von Glahn*, 88 Ga. 405. The present constitution prohibits the General Assembly from passing special laws upon this subject. *Aycock v. Rutledge*, 104 Ga. 533. But the power to pass a general law on the subject still exists. The General Assembly can not delegate to a municipality the authority to punish in a municipal court a State offense as such. *Grant v. Camp*, 105 Ga. 428. But it may authorize the punishment of an act as a city offense which would also be a State offense, provided the terms of the act conferring the authority are clear and unequivocal and manifest a legislative intent to confer authority for the punishment of such act. *Hood v. Von Glahn*, supra. The sale of liquor is prohibited in the county of Cobb. Hence a sale on Sunday, as well as on other days, would be a violation of the State law, and the authorities of the City of Marietta would have no power to provide for the punishment of one making such a sale on Sunday, in the absence of express legislative authority. The act of 1903, under which it is claimed that this authority is conferred, is a law general in its terms, and purports to confer authority upon each city in this State, and it is manifest from the language of the act that there was a legislative intent to authorize the corporate authorities of the various cities in this State to provide for the punishment of the act of selling liquor on Sunday. The act of selling spirituous liquors on Sunday is not, under all circumstances, in and of itself a distinct offense under the criminal laws of this State. *Moran v. Atlanta*, supra. The act of selling liquor at any time is, however, a distinct offense, under the criminal law of this State, in any county where a prohibitory law prevails. Hence, in order to confer authority upon the police courts of cities to punish for the sale of liquor on Sunday in such counties, express legislative authority is necessary; but the corporate authorities of cities located in those counties where no prohibitory

law prevails could provide for the punishment of those selling liquor on Sunday under the general powers in the charters of the different cities. The act in question clearly and unequivocally confers power upon the corporate authorities of the cities to punish the act of selling liquor on Sunday, and the fact that such legislation was unnecessary, so far as one class of cities is concerned, would not make the act invalid in so far as it was necessary to confer authority upon another class of cities. The act does not purport to confer authority to punish for a State offense, but it in terms grants to the corporate authorities of the different cities the right to provide for the punishment of an act which, when committed in cities of a given class, would be a violation of the criminal law of the State. We think it sufficiently appears from the terms of the act that there was a manifest legislative intent to authorize the city authorities of the different cities of the State to provide for the punishment of those who engage in selling liquor on Sunday, whether such sales be made in cities where such act would be a State offense, or in cities where such an act would not be an offense against the State. Such being the case, the ordinance passed by the corporate authorities of the City of Marietta was a valid ordinance. The police court of the City of Marietta had jurisdiction to punish for the city offense defined in the ordinance, and could proceed according to the lawfully authorized procedure and practice of that court. The applicant, when arraigned before that court, not being charged with a crime against the State, but simply with a violation of a municipal ordinance, would not be entitled, under the constitution, to a trial by jury. The case of *Hood v. Von Glahn*, supra, is controlling on this point.

3, 4. Under the act the municipal authorities could not provide for any other character of punishment than fine or imprisonment, either or both. The ordinance provides only for the punishment authorized by the act, and therefore the mayor had no authority to sentence the applicant to work upon the city chain-gang. There was no error in refusing to discharge the applicant, but he should not have been remanded to the respondent to work upon the city chain-gang. Direction is given that he be remanded to the custody of the respondent, to be carried before the mayor of Marietta to be sentenced, in accord-

ance with the act and the ordinance. He should have been released from the chain-gang, but held in custody as one duly convicted in the mayor's court, subject to sentence therein according to law. *Wells v. Newton*, 101 Ga. 142 (4); *Russell v. Tatum*, 104 Ga. 332; *Screen v. State*, 107 Ga. 715. The judgment will be affirmed, with direction to this effect.

Judgment affirmed, with direction. All the Justices concur, except Simmons, C. J., absent.

GOSSETT v. THE STATE.

1. A father may protect his minor female child from seduction or debauchery, and if necessary for that purpose, where the criminal act is in progress or about to take place, may slay the wrong-doer. But to deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, is not justifiable.
2. Under the facts of this case there was no error in falling or refusing to charge section 74 of the Penal Code.
3. The charge given by the court did not clearly and distinctly place before the jury the issues involved, as to whether the homicide was murder, voluntary manslaughter, or justifiable.
4. On the trial of an indictment for murder, the defendant having admitted the homicide but having sought to justify it on the ground that the deceased was seeking and actually proceeding to ruin his minor daughter, and that he was outraged in his feelings and acted for the purpose of protecting his child and preventing the wrong, it was admissible in rebuttal for the State to introduce evidence of notorious character for lewdness on the part of the defendant's daughter in the community where the defendant and the deceased resided and worked.
5. It was not permissible for the State to show that the defendant's daughter had been seen by a witness between nine and ten o'clock at night, sitting on a fence talking to a man, no connection between such fact and the homicide appearing, and no knowledge thereof on the part of the defendant being shown.

Argued May 16, — Decided June 17, 1905.

Conviction of manslaughter. Before Judge Henry. Walker superior court. March 29, 1905.

John Gossett was indicted for the murder of John Doner. He was found guilty of voluntary manslaughter, moved for a new trial, and, upon its refusal, excepted. The evidence for the State showed, in brief, the following facts: The defendant killed the deceased by stabbing, at a place where the deceased lived in

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124	820
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Walker county. The defendant and the deceased lived a few hundred yards apart. None of the witnesses saw the actual homicide, but some of them heard what appeared to be a fight in progress, and on going to the scene found the deceased in a dying condition and the defendant standing over him. One of the witnesses testified as follows: "Mr. Gossett stated to me that he killed Doner, and that he would do it again under the same circumstances; he just stated that he would do it again if it was to do over. He said it was about his daughter; he said his daughter was there in Doner's room, in Doner's bed; he said that Mr. Doner had been in the habit of coming up there to his house (Gossett's house) for six or eight months, and that he was there on the evening of the killing, prior to the killing. I think that Gossett said that he was waked up by his wife and told that his daughter was gone. Gossett also stated that he went to the door of Doner and knocked, and that Doner got up, and that he turned the knob and found the door unfastened, and that he walked into the room. He said that he found his daughter in there. He said he asked Doner where his daughter Callie was, and Doner said he didn't know. Callie was Gossett's daughter. He didn't say that it was in the dark. He didn't tell me that Doner said she wasn't there; he said he didn't know where she was at, and this was in answer to Gossett's question as to Callie's whereabouts. . . . When I got down there they decided that they would want Callie at the coroner's inquest, and I went up to the house where they lived and went in, and Mrs. Gossett said that she had not seen Callie. I found her at a house where colored people lived. She was in bed with two negro children." Both the plaintiff and the defendant were connected with the United States Army post in Walker county, the defendant being employed with the pack-train. The defendant introduced no evidence, but relied on his statement, which was similar to that detailed by the witness, only fuller. Among other things he stated as follows: The deceased and he had worked together for two years, and were intimate friends—almost like brothers; and the deceased was a constant visitor in his family. On the night of the homicide he was at the defendant's house, and when the latter became tired he excused himself, leaving the deceased and several members of the family together. In the night his wife waked him

and told him that their daughter was gone, and that she thought Doner had run away with the girl. He went to Doner's house and called for Doner's roommate to see if she was there and to make inquiries after her. After knocking and calling twice and receiving no answer, he turned the door knob and the door came partly open. Doner came to the door, and, on inquiry, denied knowledge of the girl's whereabouts. Defendant went in and found his daughter in Doner's bed. He smelled whisky strongly on her breath, and "that caused me to think that he had brought her there to ruin her and the rest of us for the rest of my days. And I tell you what's a fact, when such feelings as that come over you, it sure hurts you, and to ruin a child of mine it sure hurts." He turned on Doner, a scuffle ensued, and Doner was killed.

In rebuttal the State introduced the evidence of several witnesses to show that they knew the general character as to virtue or lewdness of Callie, the defendant's daughter, in that neighborhood; that the general talk around there was that she was not considered a virtuous woman, and that her character for lewdness was bad; that the general talk among those who worked around that place was that she was of bad character and had been for a year previous; that Gossett worked with the pack-train which was right in the neighborhood of where this gossip was going on, and both he and Doner lived there; and that this was talked among the soldiers and employees of the United States Government. One of the witnesses testified, that the girl appeared to be about seventeen or eighteen years old; that she "was a medium-sized woman;" that she wore short dresses when the witness first knew her, but had put on long dresses reaching about to her shoe tops. Evidence was also admitted to show that she had been seen on several occasions at night away from home, once on the road with a negro girl, once sitting on the "corral" fence talking with a man between nine and ten o'clock at night, and at another time coming out of the pack-train quarters about eight o'clock at night; and that she had been seen in the pack-train quarters, running and playing with the men in their sleeping quarters, and in the kitchen; also that she had been seen at the railway station at eight or nine o'clock at night. The defendant made a further statement, in

which he said that his daughter was only fifteen years old, and that if she had done anything wrong or had a bad reputation, he had no knowledge of it. The motion for new trial was based on the grounds, that the verdict was contrary to law and the evidence, and that the court erred in various charges and omissions to charge, and in the admission of evidence to show the general character of Callie Gossett to be lewd, over objection on the ground that it was not in rebuttal, that it was immaterial and irrelevant, and that there was no evidence that the defendant knew, at the time of the homicide, of such lewd character. Another ground of the motion was based on the evidence of a witness who testified that he saw her in the "corral" between nine and ten o'clock at night, talking to a man, over objection on the ground that the State was singling out a specific act of Callie Gossett to show bad character, and that this was improper; also that there was no evidence that defendant had notice of the fact.

Payne & Payne, R. M. W. Glenn, W. A. Schoolfield, and F. W. Copeland, for plaintiff in error.

W. H. Ennis, solicitor-general, and Bale & Shaw, contra.

LUMPKIN, J. (After stating the foregoing facts.) 1. It was said, in the case of *Wilkinson v. State*, 91 Ga. 737: "This court will go as far as the rules of established law will permit in protecting the virtue and chastity of the wives and daughters of this State from the criminal wiles of the adulterer and seducer, and will uphold husbands and fathers in all they may lawfully do to maintain and protect the sanctity of their homes and fire-sides." And again, "The law permits and will justify the homicide of another by the husband to prevent the seduction of the wife, or even to prevent the committing with her of a single act of adultery, if by his previous conduct he has not forfeited the right" (p. 734). But in such cases, whether relating to wife or daughter, the idea of prevention or defense against an impending or progressing wrong must be involved, in order to render the homicide justifiable. "To deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, can not be justifiable." *Hill v. State*, 64 Ga. 453 (2). "A husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act is just over or about to begin." *Drysdale v. State*, 83 Ga.

744; *Wilkerson v. State*, supra. But the law will not justify deliberate revenge. However grievous a past wrong may have been, the law does not intrust its punishment to individual vengeance. For cases where the defense was under section 75 of the Penal Code, on account of wife or daughter, see *Jackson v. State*, 91 Ga. 271; *Futch v. State*, 90 Ga. 472; *Channell v. State*, 109 Ga. 150, 153; *Cloud v. State*, 81 Ga. 444; *Mays v. State*, 88 Ga. 399, 402; *Baker v. State*, 111 Ga. 141-2; *Richardson v. State*, 70 Ga. 825; *Bone v. State*, 86 Ga. 108; *Perry v. State*, 102 Ga. 365; *Elliott v. State*, 46 Ga. 159. While the case of *Biggs v. State*, 29 Ga. 723, contains many strong and forcible expressions, it has not been considered by the court as conflicting with later rulings. *Wilkerson v. State*, 91 Ga. 733, supra.

2. Several of the grounds of the motion for a new trial complain that the court did not give in charge to the jury the whole of section 74 of the Penal Code, which reads as follows: "Parents and children may mutually protect each other, and justify the defense of the person or reputation of each other." It is urged that the court should have instructed the jury that, if the defendant killed Doner in defense of the person or reputation of his daughter, it was justifiable homicide. Prior to the codification of 1895, the section quoted did not form any part of the Penal Code, but was in the Civil Code. It was first codified in the original Code of 1863 as §1747, in the chapter relating to parent and child. It was continued in the civil division of the successive codes until that of 1895, when it was transferred and became section 74 of the Penal Code. Sections 70, 71, 72, 73, and 75 of the Penal Code date back to the Penal Code of 1833, where they form sections 39 to 43 inclusive. Cobb's Digest, 784-5. With these five sections in the penal division of the code and what is now section 74 then incorporated in the civil division of the code, nearly all of the decisions above cited were made. In *Hill v. State*, supra, it was held that section 75 should be construed in connection with sections 70, 71, 72, and 73; that the expression, "all other instances which stand upon the same footing of reason and justice as those enumerated," had reference to those sections; and that the idea of defense against some impending and pressing wrong entered into all of them. In our judgment, the insertion of

section 74 into the Penal Code, and its adoption, were not intended to wholly change the law as previously adjudicated. The protection of the parent or child by the other, when necessary, would have fallen within section 75, under the former arrangement of sections. But it must be considered in the light of the other sections mentioned. The rules which justify, or under the ancient law excuse, a homicide in self-defense have long been held to extend to parent and child and husband and wife. *Armistead v. State*, 18 Ga. 704; 4 Bl. Com. 186 (Hammond's ed. 230). What effect is to be given to the expression, "or reputation of each other," it is not necessary now to decide. Certain it is that a man can not be justified in committing a homicide because some slander has been perpetrated upon him, or upon his child. If any case can exist where a man may lawfully slay to prevent a libel or slander upon him or upon his child from being published, it has not been suggested to us. But no question of preventing injury to reputation is involved in this case. There was no evidence to show that any violent personal injury was sought to be accomplished upon the daughter of the defendant, or that there was any threatened or impending libel or slander which would affect her reputation. It would not have been proper, under the evidence, to have instructed the jury, in effect, that the defendant had the right to kill the deceased to protect his daughter's person or reputation. The writer has found but one place in which § 1796 of the Code of 1882 (Penal Code, § 74) has been cited in a criminal case, and there only passinglly. *Osgood v. State*, 63 Ga. 793.

3. Without discussing the various grounds of the motion separately, it may be said that the charge given by the court did not clearly and distinctly place before the jury the issues involved in the case. It was in question whether the killing of the deceased by the defendant was murder; or whether, under the circumstances disclosed by the evidence, the defendant was guilty of voluntary manslaughter; or whether, under section 75 of the Penal Code as construed in the *Hill* case and other decisions above cited, this was one of the "other instances which stand upon the same footing of reason and justice as those enumerated" in sections 70, 71, 72, and 73, so as to make the homicide justifiable.

4. "The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." Penal Code, §993. In a murder case the State can not put in issue the character of the defendant for violence, or the character of the deceased for peaceableness, but may introduce evidence on that subject in rebuttal. *Pound v. State*, 43 Ga. 88. In some cases evidence as to character for chastity is relevant and admissible; as on the charge of keeping a lewd house (*McCain v. State*, 57 Ga. 390), or of being a street walker. *Braddy v. Milledgeville*, 74 Ga. 516. For other rulings on the subject, see also *Blackman v. State*, 36 Ala. 295; *Foulkes v. Sellway*, Esp. 234; *Fall v. Overstreet*, 3 Munf. 495; *Commonwealth v. Gray*, 129 Mass. 474. In the case at bar the character sought to be proved is not that of the defendant or the deceased, but of the daughter of the former, to protect whom from ruin he claimed to have slain the deceased. The homicide was not denied. The defense rested upon the contention that the defendant acted for the purpose of saving his daughter from being seduced or debauched. He contended that she was a very young girl, and sought, in his statement, to put the deceased in the attitude of being on the point or in the act of ruining her. Was this true? Or, if not entirely so under the actual facts, was the defendant guilty of murder or manslaughter, or was he justifiable? Where the defense is based on section 75 of the Penal Code, and it is claimed that the facts of the particular case make it one of the instances which stand upon the same footing of reason and justice as those enumerated in other sections of the code already referred to, it will be perceived that the alleged conduct of the deceased is to be somewhat analogized to an effort to slay the defendant, or by violence or surprise to commit a felony upon habitation, property, or person, or seeking to make a forcible invasion upon the property of another with intention to commit a serious injury, or in such manner that serious injury might accrue to person, property, or family; and the person who kills and relies on that section of the Penal Code for his defense occupies a position somewhat analogous to one claiming to have defended against the acts referred to in the other sections of the Penal Code mentioned as

therein provided. This is clearly stated in *Hill's* case, 64 *Ga.* 467, *supra*. Where the defense rests upon the section just referred to, the case involves a consideration of the conduct both of the deceased and of the defendant in connection with the transaction. In the case of *Biggs v. State*, 29 *Ga.* 723, 725, evidence in regard to the general character of Mrs. Biggs (the defendant's wife) for virtue and chastity was admitted. Lumpkin, J., in delivering the opinion, said: "Her reputation in this respect has been implicated both by the conduct and evidence of Eleazer M. Parish. And if she was the woman he took her to be, the conduct of her husband would have been less justifiable in resorting to the means he did, to rescue and protect her from insult and importunity. We hold, therefore, that the proof should have been received." 2 Bish. Cr. Proc. (4th ed.) § 95. The evidence in that case was offered by the defendant; but if the general character of the defendant's wife for virtue and chastity was implicated so as to authorize the defendant to introduce evidence to sustain it, why was it not so far brought into the present case by the defendant as to authorize the State to introduce rebutting evidence on the subject?

In a word, the case stands thus: The homicide is admitted. The defendant, however, asserts that he was justified in killing the deceased, because the latter was proceeding to ruin the defendant's little daughter, and she was found by defendant in his bed, her breath full of the odor of whisky. The State responds by seeking to prove that this is not true; that the deceased was not proceeding to ruin the defendant's daughter; that she was a young woman of lewd character; and that this was so notorious in the neighborhood where the defendant and the deceased both worked and resided, among those with whom they dealt, that the defendant must have previously known of the fact; and therefore that his statements in regard to his own conduct and that of the deceased, and also in regard to his own motives and the unexpected discovery which outraged his feelings as a father, were not in fact as he stated them to be. It is competent for the State to introduce evidence to rebut the defendant's statement. *Holsenbake v. State*, 45 *Ga.* 44 (3).

In the *Hill* case, 64 *Ga.*, *supra*, evidence of previous lewd conduct on the part of the defendant's wife, and to show that he

knew of it, was admitted and commented on as a material factor in the case; and this is also a fact in other cases hereinbefore cited. It is true that no ruling was made upon the admissibility of the evidence, but it was discussed as a material part of those cases. It is also true that the defendant might claim the right to prevent cohabitation with his minor daughter, even though she had fallen, and to use force, if necessary, for that purpose, unless by his conduct he had forfeited that right. But whether or not, under a certain state of facts, the defendant would be justified in killing the deceased, this furnishes no reason why he should be permitted to assert what may be an entirely different state of facts, and yet exclude the State from disproving his statement. It would savor too much of trying a case by excluding light, rather than by admitting it. Of course we do not mean to express any opinion as to what was the character of the girl, or whether the father had any knowledge of it, if it was bad. What weight the jury would give to the evidence of her general bad character, and whether they would believe that in fact the defendant had knowledge of it or not, does not affect the admissibility of the evidence, in rebuttal. But with all legitimate evidence in, it remains to be decided whether the case is one of murder, voluntary manslaughter, or justifiable homicide. The Civil Code, § 5176, declares that "When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." As to the question of knowledge on the part of the defendant, in *Kuglar v. Garner*, 74 Ga. 765, it was held that "It is admissible to prove the notoriety, in the neighborhood where the parties reside, of a fact already proved to exist, to lay the foundation for an inference that the plaintiff was cognizant of that fact." This was a civil case, and the rule of civil law, which charges a person who is put on inquiry with notice of whatever such inquiry reasonably prosecuted would develop, does not apply to criminal cases. Nevertheless it has been held that in certain criminal cases, where it is material to bring home to a party cognizance of a particular fact, common reputation where he resides or does business is admissible. Whart. Crim. Ev. (9th ed.) § 254.

At common law if a man caught another in the act of adultery

with his wife and killed the adulterer upon the spot, it was not justifiable or excusable homicide, but manslaughter. Blackstone says: "So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon, as likewise by the Roman Civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths; yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." 4 Bl. Com. 191, 192 (Hammond's ed., top page 237). This seems to have been the common law, although East, in his *Pleas of the Crown* (p. 272), referring to the act of 24 Henry VIII, c. 5, uses the expression, "But though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide which stand upon the same footing of reason and justice." 2 Bish. Crim. Law (8th ed.), § 708. On this subject see *People v. Cook*, 39 Mich. 236, s. c. 6 Lawson's Crim. Defenses, Supp. 368. In Texas a special statute was passed on the subject. *Price v. State*, 18 Tex. App. 474, s. c. 5 Lawson's Crim. Defenses, 1095, 51 Am. R. 322, 328, and note; *Varnell v. State*, 26 Texas App. 56 (involving a minor daughter); *State v. Herrell*, 97 Mo. 105, s. c. 10 Am. St. R. 289 (adultery with defendant's mother). As to the construction which has been placed upon section 75 of the Penal Code, in cases involving a claim of debauchery or seduction of wife or minor daughter in this State, see cases above cited. See also *Wair v. State*, 51 Ga. 310. Under the construction which has been placed upon that section, allowing somewhat greater latitude for justification in cases of the kind referred to than did the common law, and in view of the right of the accused to make a statement to the jury, which is accorded in this State, there is the more reason why, when one relies upon that section for his defense, all the light legitimately derivable from the evidence should be obtained. *Haynes v. State*, 17 Ga. 465, 484; *Noles v. State*, 26 Ala. 131, 62 Am Dec. 711. We are aware that evidence of character is not usually received, when offered for the purpose of throwing light on the probability

of the doing of a certain act by a person whose character is thus testified about. 1 Gr. Ev. (16th ed.) §14(b), (a). But this is quite different from the question presented in the case at bar.

5. Where character is a part of the issue, as, by way of illustration, in an indictment for seduction, special acts have sometimes been admitted. For instance see 1 Gr. Ev. (16th ed.) § 14 (h); *Com. v. Gray*, 129 Mass. 474, *supra*; *White v. Murtland*, 71 Ill. 250; *Caldwell v. State*, 17 Conn. 467; *Foulkes v. Sellway*, Esp. 234, *supra*; *Blackman v. State*, 36 Ala. 295, *supra*; *Wood v. State*, 48 Ga. 192. But otherwise particular conduct as evidence of character is generally held inadmissible. Unchaste conduct of a wife or daughter, known to a husband or father prior to a homicide by him claimed to have been committed to prevent a seduction or criminal intimacy with her, may throw light on his motives and acts. On the trial of an indictment for rape, or assault with intent to rape, general character, but not particular acts to show want of chastity in the female alleged to have been raped, has been held admissible. *Black v. State*, 119 Ga. 476; *Camp v. State*, 3 Ga. 417; *Seale v. State*, 114 Ga. 518. We do not see how evidence that the defendant's daughter was seen talking to a man at night, not shown to have been known to the defendant, could have illustrated the issue. It should have been rejected.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

PARKER v. BALLARD, administrator.

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1. Where an equitable petition was filed by the administrator of the grantor, seeking to cancel a deed on the ground that the deceased was mentally incapable of making it, that it was procured by fraud and undue influence, and that, while it purported to be made in consideration of services rendered by the grantee to the grantor, no such services were in fact rendered, on the trial the grantee was incompetent to testify that services were in fact rendered to the grantor by himself and his children, and to state the character of such services.
2. The contents of a petition filed in a court of record in a county other than that where the trial took place should be proved by a certified copy of the record, and not by parol.
3. In an equitable action brought by the administrator of the grantor, to cancel a deed on the ground of want of mental capacity on the part

of such grantor to make it, and on the ground that it was procured by fraud and undue influence exercised by the grantee, where it was alleged by the plaintiff that the deed purported to be made in consideration of services rendered to the grantor by the grantee, but that in fact no services were rendered, and that the grantee had been fully paid for any services which he may have rendered, but that, if it should be found that any such services were rendered, the plaintiff was ready and offered to pay the value thereof in order to have the deed cancelled; and where on the trial some evidence was introduced by the defendant to show certain services rendered, but no estimate of their value was made by the witnesses; and where the court submitted special questions of fact to the jury, one of which inquired if any services had been rendered, and, if so, what was their value; and where it does not appear that any objection was made to such question, and no error is assigned in the motion for new trial, or by bill of exceptions, on the submission of that issue, under such circumstances it furnished no ground for a motion for new trial on behalf of the defendant that the jury fixed a valuation upon such services in their verdict, thus finding in his favor such sum.

4. Considering the entire evidence, both that in regard to the question of mental capacity of the grantor to make the deed involved in this case and that introduced by the defendant tending to show recognition of the deed during lucid intervals after it was made, the verdict was supported by the evidence.

Argued May 18, — Decided June 17, 1905.

Equitable petition. Before Judge Lewis. Jasper superior court. December 7, 1904.

R. W. Ballard as administrator of S. R. Parker, deceased, filed an equitable petition against L. B. Parker, in the superior court of Jasper county, seeking to recover certain land, and to have a deed made by the deceased to the defendant cancelled, on the grounds, that the deceased did not have mental capacity to make it, and that it was procured by undue influence. By amendment the plaintiff alleged that the deed sought to be cancelled expressed a consideration of services rendered; that this was wholly fictitious, and no such services were rendered by the defendant to the deceased; that the defendant had been fully paid for any services which he may have rendered; and that, if it should be found that any services were rendered, the plaintiff was ready and offered to pay the value thereof as an offer and tender precedent to having the deed cancelled. Mesne profits were also claimed. The defendant admitted that he was in possession of the land, and claimed it as owner, but denied the substantial allegations on which the plaintiff based his claim for relief. On the trial the evidence was conflicting. The defendant introduced

some evidence to show that he and his children rendered services to the deceased in the latter part of his life, while he was feeble and in bad health. No witness gave any opinion as to the value of such services. The case was submitted to the jury on special questions of fact, and, so far as the record discloses, no objection was made to the questions propounded. The jury, in answer to them, found that the deed was void for want of mental capacity on the part of the maker; that a reasonable rental value of the land was \$150, and that the defendant rendered services to the deceased of the value of \$150. A motion for a new trial was overruled, and the defendant excepted.

Fleming Jordan & Son, for plaintiff in error.

Greene F. Johnson, contra.

LUMPKIN, J. (After stating the facts.) 1. The administrator of the grantor being the plaintiff in the proceeding to cancel the deed, the purported consideration of which was services rendered to the deceased by the defendant, the latter was an incompetent witness to testify that he and his children had rendered services to the deceased. The rendering of such services by him was a transaction between him and the deceased. Moreover, services rendered by his children were irrelevant except in so far as they might be treated on the same basis as services rendered by him, on the ground that he was entitled to such service. Civil Code, § 5269; Acts 1900, p. 57.

2-4. The other rulings complained of sufficiently appear in the headnotes, except as to the finding of the jury in regard to the value of the services of the defendant. The plaintiff sought to cancel the deed of the defendant, on the ground that the grantor was non compos mentis. On its face it purported to be made upon a consideration of services rendered and to be rendered. The plaintiff denied that any such services had been rendered, and claimed that they were altogether fictitious. But he alleged, that, if it should appear that any such services had in fact been rendered, he was ready and offered to pay the value thereof before having the deed cancelled. As he denied that there were any such services, and only made the offer to do equity in the case if it should be found that there were any, it was not incumbent on him to disprove his own case by in-

roducing evidence to show that there were such services and what was their value. On the trial the defendant introduced evidence for the purpose of showing that some services were rendered, but did not prove what they were worth. The court submitted the case to the jury upon special questions of fact, one of which inquired, "Were any services rendered S. R. Parker by the defendant, and, if so, what is the value of such services?" In answer to this the jury found the value to be \$150. No exception or objection appears to have been taken at the time to the submission of this issue to the jury, nor does the motion for a new trial or the bill of exceptions contain any exception or assignment of error to such submission. The motion for new trial alleges only that the finding of the jury as to the value of such services was contrary to the evidence, and without evidence to support it. Under these circumstances, if the jury, after having found that the grantor did not have mental capacity to make a deed, put a valuation upon the defendant's services from the best information which was furnished them, we are of the opinion that it would not furnish a ground for new trial at the instance of the defendant. If the plaintiff were complaining of such finding, perhaps the case might be different. But the verdict seems to have been in favor of the defendant for more than, in strictness, he may have been entitled to.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

123	444
129	526

REAVES v. MEREDETH, and *vice versa*.

1. There was evidence to sustain the jury's finding that the property sold under the foreclosure of a materialman's lien belonged, not to the person against whom the lien was asserted, but to his wife.
2. Under the Civil Code, §2801, prior to the act of 1899 (Acts 1899, p. 33), such a lien must be asserted, if at all, against the true owner, who is entitled to the statutory notice for the giving of which that section provides.
3. The true owner, though cognizant that a stranger to the title is having improvements made on the premises, is under no legal duty to give to a materialman any information touching the ownership of the property; and the owner will not be estopped from setting up title thereto, as against a materialman, when nothing has been done by any one to mislead him as to the ownership of the premises improved.

Argued May 24,—Decided June 17, 1905.

Equitable petition. Before Judge Mitchell. Colquitt superior court. January 12, 1905.

In an equitable petition presented to the superior court of Colquitt county, the plaintiff below, Mrs. Dora L. Meredith, asserted ownership of a certain house and lot in the town of Moultrie, alleging that she purchased and acquired title to the premises on February 13, 1896, since which time she has been in possession of the same. Her complaint was as follows: On November 3, 1896, while she was on a visit to North Georgia, the house and lot were sold by the sheriff as the property of her husband, under an execution issued against him from the county court of Colquitt county. The premises were bid in at the sheriff's sale by D. M. Reaves, who is seeking, through the sheriff, to dispossess her. Her property is not subject to the payment of her husband's debt, and Reaves has no right to enforce the writ of possession issuing from the county court; she has a family of children, and has nowhere to go if deprived of the possession of her home; and for this reason she is entitled to an injunction to prevent her unlawful eviction by the sheriff, acting in behalf of Reaves. By an order of the court, passed subsequently to the filing of the petition, N. C. Reaves, the wife of D. M. Reaves, was substituted in his stead as the sole defendant. An answer was filed by Mrs. Reaves, in which she admitted that the plaintiff was in possession of the premises, but denied that she was the owner thereof. By way of special defense the defendant averred: In the early part of 1896, W. J. Meredith, the husband of the plaintiff, purchased of C. J. Kendall the lot to which she claims title, and subsequently entered into a contract with A. B. Turner, a materialman, for the furnishing of materials with which to erect a dwelling on the land, which materials were furnished, and Turner recorded his lien on the premises in terms of the law. He subsequently sought to foreclose his lien. Meredith resisted the effort, but the court rendered judgment to the effect that the lien was valid and binding on the property. It was sold by the sheriff under this judgment, and the defendant became the purchaser at the sale. Thereafter one Wood rented the premises from her, but failed to pay the rent. She sued out a dispossessory warrant against him, which was met with a counter-affidavit, and Meredith appeared on the trial of the issue, with coun-

sel, and defended the suit, which resulted in her favor. After purchasing the property, Meredith made a deed to it to his wife, but it was withheld from the records, the parties to it acting in collusion with a view to defeating the enforcement of the materialman's lien against the premises. Meredith thereafter represented to different parties that he was the owner of the premises, and held himself out to the world as such by living thereon, his wife participating with him in practicing this deception. The plaintiff's real purpose in bringing the present action is to keep the defendant out of possession of her premises, which she purchased in good faith and of which she is the true owner. On the hearing of the dispossessory warrant sued out against Wood, the plaintiff, claiming to be the owner of the house and lot, assisted Wood in presenting his defense, having previously induced him to attorn to her. The deed from Meredith to his wife is a cloud upon defendant's title; plaintiff is hopelessly insolvent, and she should not be permitted to retain possession of the premises without furnishing a good and solvent bond conditioned to pay the rents thereof in the event the premises should be awarded to defendant.

The pleadings have heretofore been considered. See 120 *Ga.* 727. The case went to a trial on the merits, and the jury returned a verdict in favor of the plaintiff. The defendant excepts to the overruling of her motion for a new trial; and the plaintiff, by a cross-bill of exceptions, complains of various rulings made during the progress of the trial.

J. D. McKenzie and *Shipp & Kline*, for plaintiff Reaves.

T. H. Parker and *T. W. Mattox*, contra.

EVANS, J. (After stating the facts.) 1. The controlling issue in the case was whether or not Mrs. Meredith, not her husband, was the purchaser of the lot from C. J. Kendall. It appears that on January 15, 1896, Kendall deeded the land in controversy to W. J. Meredith, though the deed was not recorded till October 23, 1900, and that on March 13, 1896, Meredith conveyed the land to his wife, this latter conveyance being recorded on July 15th of the same year. The plaintiff introduced testimony to the following effect, in explanation of how she acquired title: She was the owner of several cows, and authorized her husband to trade

them for a suitable lot in Moultrie, saying to him that she wanted a home, and that a poor home was better than none at all. Her husband concluded a trade with Kendall for the lot in dispute, telling him the cows belonged to Mrs. Meredith and she wanted the deed to the lot made to her, as she was also to furnish the sum of money agreed on as constituting, in addition to the cows, the consideration of the purchase. By the mistake of the lawyer who prepared the deed, Meredith was therein named as the vendee, and for that reason he objected to the deed, but took it home and read it over to his wife. She said she would not have it, and told her husband to take it back to Kendall and have him execute a conveyance to her. Meredith undertook to carry out his wife's instructions, but the lawyer told him he could make a deed to his wife, and prepared the deed to her which he signed. She furnished the whole of the consideration for the sale of the lot.

The defendant introduced Kendall as a witness. His recollection was not clear as to what was said when the trade was made as to the deed being made to Mrs. Meredith, but he understood Meredith to say the deed should be made to him. Witness was informed by Meredith that the cows belonged to his wife; he paid ten dollars at the beginning of the trade, and gave his note for five dollars, saying nothing as to whose money it was; when the deed was delivered to him, nothing was said about it not having been made to his wife, but several months afterwards he brought it back to the witness.

In view of this evidence, a finding that the lot was really bought and paid for by Mrs. Meredith was fully warranted. In the further discussion of the case we will therefore treat her as the owner of the premises, giving effect to the finding of the jury upon this issue.

2. The materialman's lien filed by Turner was asserted and foreclosed against "Jackson" Meredith as the owner of the land upon which the improvements were made. Mrs. Meredith was not a party to the foreclosure proceeding, and therefore was not bound by the judgment therein rendered. On March 13, 1896, not only was she the equitable owner of the land, but she at that time held the legal title thereto. It does not appear when the materials with which to build the house were furnished by Turner, but it was some time prior to June 6, 1896, the date on

which he filed his lien. His right to assert a lien on the premises improved was therefore governed by the law as it stood at that time (Civil Code, § 2801), and not by the act of December 19, 1899 (Acts of 1899, p. 33), amending that section. As Mrs. Meredith was the "true owner" of the premises, statutory notice of the assertion of a lien should have been served upon her, as such true owner, and the lien should have been filed and enforced against her, not against her husband. *Porter v. Wilder*, 62 Ga. 521, 527; *Gross v. Butler*, 72 Ga. 187; *Bullard v. Dudley*, 101 Ga. 299. Such a lien being in derogation of common-law right, the statute creating it is to be strictly construed, and the provisions of the statute are to be strictly complied with. *Gross v. Butler*, supra; *Seeman v. Schultze*, 100 Ga. 603.

3. It only remains to inquire whether or not Mrs. Meredith is estopped from asserting ownership of the property. Though she may, as owner, have assisted Wood in defending the dispossessionary warrant sued out against him, she was not a party to that proceeding, and the decision therein rendered in favor of Mrs. Reaves in no way affected the question as to whether she or Mrs. Meredith was the real owner of the premises. Doubtless that decision was put on the ground that Wood could not dispute the title of his landlord; but be this as it may, there is no estoppel by judgment as against Mrs. Meredith, she not having been a party to the case. Nor, under the evidence submitted, was she estopped by her conduct, so far as Turner, the materialman, was concerned. Although she knew that improvements were being made on her land by her husband, she was under no legal duty to put Turner on notice that she was the owner of the premises. *Rice v. Warren*, 91 Ga. 759. He could not complain that she failed to sooner record her deed; for, as to him, she was under no obligation to do so. She did nothing and said nothing to mislead him into the belief that her husband owned the land. The deed from Kendall to her husband was not put on the record until 1900; so Turner could not have relied on the record title being in Meredith; and it does not appear that he made to Turner any representations as to the ownership of the property, either at the time the materials were purchased or subsequently. Turner evidently took it for granted that Meredith owned the land, without making any inquiries to find out what was the truth in this re-

gard. No materialman's lien against the land has ever been asserted against it as the property of Mrs. Meredith, the true owner; the judgment in favor of Turner was binding only upon her husband, and the effect of the sale had thereunder was simply to divest whatever interest he had in the premises. The purchaser, under the doctrine of caveat emptor, can claim to occupy no better situation, relatively to Mrs. Meredith, than that occupied by Turner, the materialman, who failed to properly pursue his statutory remedy. Accordingly, the court did not err in charging the jury that if they believed the land really belonged to her, and the deed to her from her husband was executed before the judgment against him was rendered, then she would be entitled to recover. As already pointed out, she held the legal title to the premises long before Turner attempted to assert his lien.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed. All the Justices concur, except Simmons, C. J., absent.

ROUNTREE & COMPANY v. GAULDEN.

1. Proof of possession of the land levied on by the defendant in *fi. fa.* since the judgment casts the onus upon the claimant to prove his title. This onus was successfully carried by the claimant, by proof of perfect title from the State to himself.
2. In a claim case, whether the possession of the defendant in *fi. fa.* be relied on simply to cast the burden of proof, or as a basis of prescriptive title in the defendant in *fi. fa.*, the character of the possession is relevant to the issue.
3. An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made, unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling.
4. A new trial will not be granted solely because of the exclusion of evidence which if it had been allowed could not have produced a different result.
5. The charge of the court covered the substantial issues in the case, and is not open to the criticism made upon it.

Argued May 25, — Decided June 17, 1905.

Levy and claim. Before Judge Mitchell. Brooks superior court. January 6, 1905.

This was a claim case. The issue arose upon the levy of a *fi. fa.*, in favor of Rountree & Company against William Jones and

M. J. Jones, on a certain tract of land as the property of William Jones, and the interposition of a claim by S. S. Gaulden. The plaintiff introduced in evidence the fi. fa., dated June 13, 1891, which was issued on a judgment dated May 7, 1891, and proof that Jones died upon the land in controversy, having previously lived upon said land for 25 or 30 years. The fi. fa. had indorsed thereon the following entries: "Received from the defendants the cost on this execution, Oct. 1, 1891. J. D. Wade Jr., Clerk." "Georgia, Brooks County. No property on which to levy this fi. fa. June 4, 1898. A. J. Conoley, Sheriff." "Georgia, Brooks County. I have this day levied the within fi. fa. on the north half of lot 473 in the 12th district of Brooks County, Georgia, containing 204 1-2 acres, as the property of W. M. Jones, one of the defendants. This November 14, 1901, A. J. Conoley Sheriff." "Entered on general execution docket, June 13, 1891. J. D. Wade Jr., Clerk." "Entered on general execution docket, Oct. 2, 1900. J. D. Raysor, Clerk." The claimant, in support of his title, introduced the following documentary evidence: Grant from the State of Georgia to George Bailey; deed from George Bailey to A. G. Omler, dated June 21, 1824; power of attorney from A. C. Omler to P. E. Tebe, authorizing said attorney in fact to sell the premises in dispute; deed from A. C. Omler, by his attorney in fact, to Joseph E. Blantz, dated February 23, 1842; deed from Joseph E. Blantz to Abram Hunter, April 21, 1842; deed from Abram Hunter to Hardy E. Hunter, April 21, 1842; deed from Jesse E. Hunter, Georgia M. Coffee, Martha J. Jones, and W. E. Hunter to Hardy M. Hunter, dated December 31, 1900, the consideration of which was as follows: "the parties to this deed being the heirs at law of Hardy E. Hunter, deceased, and all of the full age of twenty-one years, and the said parties of the first part [grantors] having received their distributive share of the estate of said deceased from the administrator of said estate, and the said party of the second part [grantee] not having been settled with, and a small portion of said estate remaining undisposed of, and the said parties of the first part desiring that said party of the second part should receive what is left of said estate as his portion of the same, as well as in consideration of the sum of ten dollars to them in hand paid;" and deed from Hardy M. Hunter to claimant, January 11, 1901. All of these deeds and

the grant conveyed the premises in dispute. The claimant also introduced the interrogatories of Mrs. Martha J. Jones, who testified as follows: "I was married, in 1843, to Hardy E. Hunter, who died the latter part of 1855. My first husband and I lived in Brooks County. I was married the second time, to W. M. Jones, in 1856. My second husband and I lived in Brooks County, Georgia, on lot of land 473 in the 12th district of Brooks County. Not any one lived on this land before W. M. Jones and myself and my first husband. Never to my knowledge did W. M. Jones claim the north half of lot 473. Hardy E. Hunter claimed said lot before my marriage to W. M. Jones, and Hardy E. Hunter's estate after my marriage to W. M. Jones. W. M. F. Jones, my son, cultivated said land for the last ten years I lived on it." Being cross-examined, she said: "W. M. Jones lived and died upon the piece of land in controversy. W. M. Jones administered on the estate of my first husband, relieving me after my marriage to him. I had commenced to administer. I knew of his administration from the time it commenced. I think W. M. Jones, as administrator, sold most of the land belonging to said estate." S. S. Rountree, for the plaintiffs in *fi. fa.*, testified, that he had known the land in controversy for twenty-five or thirty years, and that W. M. Jones had lived upon it during all of that time and was living there at the time of his death, which occurred in 1897; that he knew the heirs of Hardy Hunter, deceased, naming them (they were the persons named in the deed from Jesse E. Hunter et al. to Hardy M. Hunter, introduced by claimant, and Jimpsie Hunter, who died childless and without having ever married); that Jones sold the crops raised on the place up to about 1890, and that plaintiffs extended him credit prior to that time. The plaintiffs also introduced the following: A receipt dated in 1869 and signed by E. W. Hunter, son of Hardy Hunter, deceased, J. A. Hunter, and J. E. Hunter, as follows: "Received of W. M. Jones, administrator of Hardy Hunter, deceased, late of said county, \$2,600.00 in full, entire, and complete satisfaction of all rights, claims, interest, property, or demand I now have or may have in and upon the estate, real or personal, of the said Hardy Hunter, deceased, my father; and the said W. M. Jones, administrator as aforesaid, is hereby fully and entirely discharged and acquitted of any further claim on my

part against said estate." A receipt of like tenor and effect, signed by Georgia M. Coffee, dated 187—. The jury found in favor of the claimant. The plaintiffs in *fi. fa.* made a motion for a new trial, which having been overruled, they excepted.

W. H. Griffin and Felder & Rountree, for plaintiffs.

John G. McCall and Stanley S. Bennet, contra.

EVANS, J. (After stating the facts.) 1. Upon the trial of a claim case the burden of proof is upon the plaintiff in execution in all cases where the property levied on is, at the time of such levy, not in possession of the defendant in execution. Civil Code, § 4624. Proof of possession of the land by the defendant in execution since the judgment casts the onus upon the claimant to prove his title. *Brown v. Houser*, 61 Ga. 629. When the plaintiff in execution introduced in evidence the execution, with the levy endorsed thereon, and proof that W. M. Jones was in possession of the land levied on since the judgment, the burden was on the claimant to show a better title. The claimant assumed this burden by showing a chain of title from the State to himself. The possession of the defendant, although for more than twenty years, was insufficient to establish a prescriptive title. His possession was joint with his wife, who was an heir of Hardy E. Hunter. The defendant was also the administrator of Hardy E. Hunter. Hence Jones's possession was shown to be not in his own right, but in the right of another. It also appears from the evidence that Hardy E. Hunter died in 1855, leaving as his heirs at law a widow and five children. One of the children, Jimpsie, died without having married. After his death the heirs of Hardy E. Hunter were five in number. In 1900 four of these heirs at law, who seem to have received their shares of the estate, as evidenced by their receipts to the administrator, conveyed their interest in the unadministered estate of their ancestor to their coheir, who had not received his distributive share. If the heirs who had received their shares of the estate had refused to quitclaim their interest in the unadministered estate of their ancestor to the heir who had not received his portion, the latter could have recovered the unadministered assets of his ancestor, or enough thereof to equalize him with the others, in an appropriate proceeding. By their conveyance the heirs who had

been settled with simply accorded to their coheir his right as a distributee in the estate which went into the hands of the administrator. In no event would the administrator have the right to claim any part of the unadministered assets of his intestate as his individual property simply because he had made a settlement with some of the heirs. The claimant's title was perfect, and the court might well have directed a verdict in his favor.

2. The following question was propounded to M. J. Jones, a witness for claimant, who testified by interrogatories, "State, if you know, whether or not W. M. Jones ever claimed the north half of lot of land 473 in the 12th district of Brooks county?" To which question the witness answered, "Never to my knowledge did he claim it." The plaintiffs filed their written objection to this interrogatory, on the ground that it was leading, illegal, incompetent, and irrelevant. The objection was overruled. This evidence was competent. If Jones's possession is relied on to change the onus, it is very pertinent to inquire into the character of the possession. If Jones's possession for twenty years is to form a basis for prescription, it is likewise relevant to ascertain whether his possession was in his own right or in that of another.

3. One complaint of the plaintiffs in the motion for new trial is that the court refused to allow a witness for the plaintiffs to answer a certain question. The answer which the witness would have made is not given. "An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made, unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling." *Bigby v. Warnock*, 115 Ga. 386 (4).

4. Plaintiff tendered a mortgage, made by W. M. Jones and M. J. Jones to A. J. Rountree, dated April 24, 1874, upon 28 1-2 acres of the land levied upon. The court excluded the mortgage. Even if the evidence was admissible to prove the defendant's adverse possession of a portion of the land involved, it could not have authorized a different result, as it was undisputed that at the time the mortgage was executed the property belonged to the estate of Hardy E. Hunter, and that Jones origi-

nally went in possession as administrator of Hunter, and had never notified the heirs of Hunter of his adverse claim.

5. The charge of the court covered the substantial issues of the case, and was not open to the criticism made upon it. The verdict was demanded by the evidence, and the denial of a new trial was proper.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

BENNING, administratrix, v. HORKAN.

After a motion for new trial has been overruled in the superior court, the case brought to this court, and the judgment affirmed, it is too late to amend by adding new grounds to the motion, though the amendment be tendered before the remittitur from this court is made the judgment of the superior court.

Argued May 25, — Decided June 17, 1905.

Motion to amend motion for new trial. Before Judge Mitchell. Colquitt superior court. January, 1905.

W. C. McCall, for plaintiff.

Shipp & Kline and Arnold & Arnold, for defendant.

LUMPKIN, J. This is the fourth appearance of this case in the Supreme Court. See 105 Ga. 493; 111 Ga. 126; 120 Ga. 734. The plaintiff having lost her case in the superior court, a motion for new trial made by her having been overruled, and that judgment having been affirmed by this court, the case was at an end, and a proposition to amend the motion for new trial came too late. Our law is quite liberal on the subject of amendment, but it contemplates that there shall be an end of litigation. *Southern Mutual Ins. Co. v. Turnley*, 100 Ga. 296 (7), 302; *Central Railroad Co. v. Paterson*, 87 Ga. 646.

This presents a different case from one where the judgment of the trial court has been reversed and the case sent back to that court for further action. *Savannah Ry. Co. v. Chaney*, 102 Ga. 814; *Daniel v. Foster*, 49 Ga. 303.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

RIGELL v. SIRMANS.

1. The motion to dismiss the writ of error was without merit.
2. A proceeding in a county court to eject an intruder can not be carried by appeal to the superior court. The remedy of the party dissatisfied with the judgment in such a case is by certiorari.

Submitted May 25, — Decided June 17, 1905.

Eviction. Before Judge Mitchell. Berrien superior court. January 16, 1905.

Sirmans made an affidavit before the judge of a county court, for the purpose of evicting Rigell as an intruder. A counter-affidavit was interposed, and the papers were returned to the county court for trial. The judge of the county court rendered a judgment in favor of the defendant. The plaintiff filed an appeal bond, which was approved by the deputy-clerk, and all the papers were transmitted to the superior court. The case was tried in that court upon its merits, and resulted in a verdict for the plaintiff. The defendant made a motion for a new trial, upon various grounds. The motion was overruled, and he excepted. A motion was made in the Supreme court to dismiss the writ of error, on the grounds, that there was no sufficient assignment of error in the bill of exceptions, and that the brief of evidence had not been filed at the time the motion for a new trial was heard. The bill of exceptions recites that the judge passed an order overruling the motion for a new trial, and then assigns error as follows: "To which said order defendant excepted and now excepts and assigns the same as error." The brief of evidence was not filed until two days after the motion for a new trial was disposed of, but there was no motion to dismiss the motion for a new trial on this ground.

Buie & Knight and Alexander & Gary, for plaintiff in error.
R. A. Hendricks, contra.

COBB, J. 1. The motion to dismiss the writ of error is without merit. The assignment of error is in exact compliance with the rule of this court on the subject. See Civil Code, § 5605. Even if the failure to file the brief of evidence before the time for hearing the motion for a new trial would have been a sufficient reason for dismissing the motion at the hearing, it is

not a sufficient reason for dismissing the writ of error in this court after the respondent has participated in the hearing of the motion with full knowledge that the brief had not been filed.

2. The affidavit which is the foundation of the proceeding to evict an intruder may be made before any officer authorized to administer an oath. Civil Code, § 4808. It differs in this respect from the affidavit which is the foundation of a proceeding against a tenant, which is required to be taken before a judge of the superior court or a justice of the peace. Civil Code, § 4813; *Griswold v. Rutherford*, 109 Ga. 398. The county judge, therefore, had authority to administer the oath; and he also had jurisdiction to hear and determine the issue made by the counter-affidavit. Civil Code, § 4208. The case was, therefore, properly tried in the county court. The question to be determined is, how a judgment of the county court on such an issue may be reviewed by the superior court. The section of the code which gives the county court jurisdiction to hear and determine applications for the eviction of intruders also confers upon that court jurisdiction in cases of proceedings against tenants, partition of personal property, possessory warrants, distress warrants, attachments, garnishments, habeas corpus, etc. And the section concludes with these words: "And the same rights of certiorari and appeal, when applicable, shall exist in relation to the matter specified in this section as is provided in this chapter." The provisions referred to in reference to appeal and certiorari are found in sections 4214 and 4215. An appeal is allowed in a case where "the principal sum claimed, or the damages claimed, exceed fifty dollars," and a certiorari is allowed in cases where the "principal sum or damage claimed does not exceed fifty dollars." This provision in reference to appeals can not be made applicable to a proceeding to evict an intruder, for in such a case there is no sum or damages claimed. It is manifest that this law of appeals applies to suits for money upon a cause of action *ex contractu*, or *ex delicto*, or upon some statutory proceeding. There is nothing in the law in reference to the proceeding to evict intruders which seems to contemplate that there should be a money judgment rendered under any circumstances, either by way of rent or otherwise, as would be the case in a proceeding to eject a tenant. The

judgment in the proceeding to evict an intruder is a judgment declaring that the plaintiff is entitled to possession, and the writ that issues is a writ of possession, including a fieri facias for costs. Civil Code, § 4811. The provision in the chapter referred to in section 4214, relating to appeals, is therefore not applicable to the proceeding to evict an intruder. But it may be said that under the general law of appeals an appeal would be allowable in such a case. The Civil Code, § 4453, provides: "In all cases tried and determined by a county judge, or a justice of the peace, . . . where the sum or property claimed is more than fifty dollars, either party may, as a matter of right, enter an appeal to the superior court." If this section authorizes an appeal in such a case at all, it is because of the words, "or property claimed." It is to be noted that these words do not appear in the section of the Code of 1882 from which this section was taken. Code of 1882, § 3610 (a). And it is also to be noted that section 3610 (b) of the Code of 1882 does not appear at all in the present code. That section related to appeals in claim cases, and provided that in such cases, where the property levied on was worth more than fifty dollars, there might be an appeal to the superior court from a judgment in the justice's court. It was evidently the purpose of the codifiers of the present code to make section 4453 exhaustive of the subject of appeals as dealt with by the two sections of the Code of 1882 above referred to; and the words, "or property claimed," are to be construed in the light of the fact that their appearance in the section results from the elimination of the section of the Code of 1882 in reference to claim cases. The effect of this change, therefore, is simply to give the same right of appeal in claim cases tried in a justice's court which was allowed under the Code of 1882, and to extend this right of appeal to claim cases in the county court. We do not think that this change in the section should be held to work any greater change in the law than that just stated, and therefore the section does not embrace a proceeding to evict an intruder, which has been tried in the county court. While the section relating to certiorari from the county court does not in terms embrace cases of the character now under consideration, still the superior court has jurisdiction, under the terms of the constitution, to review the judgments of all inferior judicatories by certiorari, and the party

dissatisfied with the judgment of the county court has this remedy. See, in this connection, *Fontano v. Mozley*, 121 Ga. 46. The superior court was without jurisdiction to entertain the appeal; and the judgment will therefore be reversed, with direction that the appeal be dismissed, and the judgment of the county court stand unaffected by the pretended appeal.

Judgment reversed, with direction. All the Justices concur, except Simmons, C. J., absent.

BOSTON MERCANTILE COMPANY *et al.* v.
OULD-CARTER COMPANY *et al.*

1. When proceedings have been begun under the Federal bankruptcy act of 1898, the operation of the insolvent traders' act (Civil Code, §§ 2716-2722) is, as to the subject of the suit, suspended; but in the absence of any proceeding in the United States courts, the State courts have jurisdiction to try all cases coming within the purview of the act last mentioned.
2. The petition was awkwardly drawn, but was sufficient to authorize the order granted, appointing a receiver and making the injunction permanent.
3. The affidavit of the attorney for the plaintiff in a petition for injunction and receiver, to the effect that he knows the recitals of fact in the petition to be true, is a sufficient verification of the petition.
4. The admission of relevant evidence at any stage of a case is never ground for a new trial. This is so though the party offering the evidence (which consisted of affidavits) failed to comply with an order of the court requiring that all affidavits to be used as evidence be filed in the clerk's office a given number of days before the day set for the hearing.
5. Where at an interlocutory hearing of a petition for injunction and receiver, to which a demurrer has been filed, the whole case is heard together on the petition, demurrer, answer, and evidence, it is not error to refuse to allow the defendant to open and conclude the argument on the demurrer.

Submitted March 20, — Decided June 17, 1905.

Injunction and receiver. Before Judge Mitchell. Thomas superior court. January 27, 1905.

M. Baum and L. W. Branch, for plaintiffs in error.

CANDLER, J. The case laid by the petition is substantially as follows: The Boston Mercantile Company, a trading corporation, doing business in Boston, Thomas county, Georgia, is indebted to plaintiffs in named amounts, the debts being matured, unpaid, and unsecured, and amounting to more than one third of the unsecured indebtedness of the corporation, which is insolvent. Pay-

ment has been demanded and refused. On January 13, 1905, W. Z. Brantley, C. P. McRae, Fred Feltham, and C. R. McRae, all stockholders of the Boston Mercantile Company, presented to the superior court of Thomas county a petition praying the court, for reasons therein set forth, to permit the surrender of the franchise of the Boston Mercantile Company, and for the appointment of a receiver to take and hold the assets of the corporation, so that they might be duly administered, and that the funds arising therefrom, if any, remaining after payment of creditors, be distributed among the stockholders as their interest might appear. The court accepted the surrender of the franchise and appointed a receiver as prayed. On January 16, 1905, the petitioning stockholders appeared before the court and asked leave to dismiss their petition, "and upon said motion the court passed an order dismissing the petition and directing the receiver . . . to surrender the assets to the petitioners in said petition," which was done. "The order passed upon the petition of said stockholders enjoined all creditors from proceeding in any manner to enforce their claims against said corporation, and required them to appear in this court and prove their claims and assert whatever legal rights they may have in the premises in the said proceedings." It was alleged that the surrender of the franchise of the corporation as set out left the assets which were in the hands of the receiver without any person legally qualified to administer them, and that there was "manifest danger of loss or destruction of same, or material injury to those interested in said assets." The stockholders of the Boston Mercantile Company are continuing the business of that concern as a partnership, under the name of the Boston Mercantile Company. An indebtedness was alleged against this firm in the same amounts and on the same claims as those charged against the corporation in the outset of the petition. It was alleged that the firm was insolvent, and that the amount due by it to the plaintiffs constituted more than one third of the unsecured debts of the insolvent firm. The prayers of the petition were: (1) that a receiver be appointed to take and hold, subject to the order of the court, all the assets of the Boston Mercantile Company and of said insolvent firm of traders; (2) that the Boston Mercantile Company and said insolvent firm of traders be enjoined from selling or disposing of or incumber-

ing any of said assets; and (3) for judgment for the amounts alleged to be due, for general relief, and for process. The defendants demurred to the petition, on numerous grounds, but the demurrer was overruled. They also filed an answer in which the material allegations of the petition, were denied. They denied the existence of any partnership composed of the stockholders of the Boston Mercantile Company, and averred that after the appointment of a receiver and the dismissal of the petition of the stockholders, the assets of the corporation were turned over by the receiver, not to the stockholders as individuals, but to the corporation through its president. The court granted a restraining order, and appointed a temporary receiver. At the hearing the evidence offered went mainly to the value of the assets of the Boston Mercantile Company in the hands of the receiver, and was quite conflicting. There was no evidence of the existence of any partnership consisting of the stockholders of the corporation, nor did it appear that the stockholders as individuals had ever been in possession of the assets. On the contrary, it appeared that the order of January 16, 1905, granted upon the request of the stockholders for leave to dismiss their former petition, directed "that the receiver be discharged, and that he turn over to the plaintiff, the Boston Mercantile Company, through its president, W. Z. Brantley, all of the property and assets of said corporation, and the keys of said store." After hearing the evidence and arguments, the court passed the following order: "Upon hearing had this day it is ordered, considered, and adjudged, that injunction issue as prayed, and that James M. Jones, Esq., be and he is hereby appointed permanent receiver and ordered to take charge of all the assets of the defendant. It is further ordered that the receiver keep open the storehouse of defendant, and proceed to sell at retail the stock of goods, keeping a strict account of all sales made, and report same to the court. Said receiver is authorized to employ only such assistants as are actually necessary to carry on the business, and pay the assistants weekly, taking their receipt for same as his vouchers." The defendants except to this order, to the overruling of their demurrer, to the refusal of the court below to allow them the opening and conclusion of the argument on the demurrer, and to the admission of certain evidence over their objection.

1. An important question raised by the demurrer is whether jurisdiction of the suit was in the State court or in the Federal court. It is urged that the passage of the Federal bankruptcy act of 1898 had the effect to suspend the operation of our insolvent trader's law; and that while the United States law is in force all proceedings to administer the estate of an insolvent trader must be brought in the Federal court under the bankruptcy law. That the Georgia insolvent trader's act is in some respects similar to a State bankruptcy law is undoubtedly true, and attention has been called by this court to these features of the act, in *Comer v. Coates*, 69 Ga. 491, and *Ryan v. Kingsbery*, 88 Ga. 361-389. In the first of these cases the court, through Chief Justice Jackson, in discussing the insolvent trader's act, said (p. 495): "It is putting a trader in bankruptcy and relieving him from past debts, as far as State legislation can do;" and upon the authority of this case and that of *Ryan v. Kingsbery*, supra, the United States circuit court, in the case of *Carling v. Seymour Lumber Co.*, 8 Am. Bank. Rep. 29, held that the Georgia insolvent trader's act "is a kind of State bankruptcy law, putting a trader in bankruptcy and relieving him from past debts, as far as State legislation can do so, but its operation was suspended by the passage of the bankrupt act of 1898." This case, as well as that of *Comer v. Coates*, proceeds upon the idea that the insolvent trader's act contains that essential to a valid bankrupt law, a provision that the debtor shall be relieved from further liability on his then existing debts. How this idea could ever have obtained we are at a loss to understand. The only warrant for it is in the Civil Code, § 2722, which is as follows: "It shall be in the power of the chancellor, in his final judgment in the cases provided for, to express his opinion, if the facts authorize it, that from the facts as they have transpired during the progress of the cause, the defendant has honestly and fairly delivered up his assets for distribution under the law, and to recommend to the creditors of the defendant that they release him from further liability." In its last analysis this section means nothing more than that the judge shall have power to express his opinion in open court as to the good faith which the defendant has shown in surrendering his assets to the receiver, and to give

some benevolent but useless advice to the creditors. He may play Portia to the creditors' Shylock, reminding them that "the quality of mercy is not strained," and admonishing them: "Though justice be thy plea, consider this, that, in the course of justice, none of us should see salvation: we do pray for mercy; and that same prayer doth teach us all to render the deeds of mercy." But if, like Shylock, the creditors should fail to appreciate the beauty of this advice and should demand to the utmost the pound of flesh, the law of Georgia, unlike that of Venice, affords no avenue by which the unfortunate debtor can "get back at" his adversary. We have yet to learn of a case where even the scant power given by the code section has been exercised by any chancellor. In *Comer v. Coates*, supra, the question whether a debtor could be released from his debts by the exercise of the power conferred on the trial judge in the code section under consideration was not even remotely involved; so that the assertion of the learned Chief Justice that the insolvent trader's act is "putting a trader in bankruptcy and relieving him from past debts, so far as State legislation can do so," may well be considered as obiter, and not binding on this court; while the ruling of Judge Shelby in *Carling v. Seymour Lumber Co.*, supra, which rests upon the authority of that case, may be dismissed from consideration, upon the ground that the learned jurist who delivered the opinion was simply misled by the dictum above referred to. The insolvent trader's act is unquestionably an insolvency law; but, as we have seen, it lacks one necessary element of a bankruptcy law, viz., a provision that after discharge the debtor shall be released from further liability on his debts. If, after proceedings have been begun under its terms, the Federal court obtains jurisdiction of the person or property of the defendant, either by a voluntary petition in bankruptcy or by a suit filed by other creditors of the defendant, there can be no doubt that the State court must yield jurisdiction. *Merry v. Jones*, 119 Ga. 643. But where the bankrupt court has never taken jurisdiction, we do not deem it to be necessary for creditors to go into the Federal court in preference to the State court. The law on this subject is fully and clearly stated in *Collier on Bankruptcy* (4th ed.), 531, from which we quote as follows: "No bankruptcy law since that of 1800 has

contained any provision declaring the effect of such a law on analogous State laws. That law, § 61, provided as follows: 'This act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act.' So far as it goes, the clause quoted is doubtless still the law. There was no need to insert it in subsequent statutes; for ere the act of 1841 was passed, the Supreme Court had delivered two epoch-making decisions, which settled the law on the subject: (1) that, when Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing State insolvency laws applying to the same persons are suspended, but (2) that, this power not being exclusive, State laws are valid and continue operative so far as they do not conflict with the paramount Federal law,"—*Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213.

2. It must be admitted that the petition was awkwardly drawn. No good reason appears why the stockholders of the Boston Mercantile Company, as a partnership, should have been made parties to the action. It seems that an effort was made by them to dissolve the corporation of which they were members, that they offered to surrender their franchise to the court, and that this offer was accepted. It is not necessary to discuss the question whether the existence of a corporation may be terminated in this manner—it is sufficient to say that after the attempt was made to kill the subject, restoratives were applied and it was brought back to life. In fact, it was never "entirely dead." According to the petition, the assets of the corporation were turned over to the petitioning stockholders, presumably in their individual capacity. If such were the case, the individuals would hold the assets merely in trust for the corporation. But the evidence shows that the assets were turned over to the corporation itself, through its officers, and the stockholders were not shown to have been connected in the slightest manner with the business or the assets in their individual capacity or as a partnership. The petition was also faulty in that it alleged two distinct debts to be due to the plaintiffs by two distinct legal entities—one the Boston Mercantile Company, a corporation, and

the other the Boston Mercantile Company, a partnership composed of named individuals. But construing the petition in the light of the undisputed evidence, it appears that the indebtedness sued on was due to the plaintiffs by the corporation; and that had all reference to the stockholders as a partnership been left out, the petition would have been good. The action was more against the property involved than the parties in whose possession it was; and as there was no dispute as to who the real debtor was or as to the justice of the debt, the granting of the injunction and appointing of a receiver by the court in the face of the demurrer setting up the technical misjoinder of parties will not be held error.

3. The Civil Code, § 4966, requires that "petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief should be verified positively by the petitioner, or supported by other satisfactory proofs." This does not mean that only the petitioner may verify the petition, but that whatever verification is had shall be positive in character. Therefore, where, as in the present case, the attorney for the petitioner makes a positive affidavit that of his own knowledge the recitals of fact in the petition are true, the verification of the petition is sufficient. See *Dunham v. Curtis*, 92 Ga. 514.

4. It appears that by an order of court, passed prior to the hearing, all affidavits to be used as evidence were required to be filed at least three days in advance of the hearing, but that nevertheless certain affidavits were allowed in evidence over the objection of the defendants, which were filed on the day of the hearing, and of which the defendants had no notice or service. It does not appear, however, that the defendants asked for time in which to meet these affidavits. The admission of these affidavits is assigned as error. Clearly this was a matter within the sound discretion of the trial judge, and that discretion will not be controlled unless it is shown to have been abused. No such showing was made in this case. *Electric R. Co. v. Savannah R. Co.*, 87 Ga. 261.

5. Error is also assigned upon the refusal of the court to allow the defendants' counsel the opening and conclusion of the argument on the demurrer filed to the petition. It appears that the demurrer was considered at the interlocutory hearing, along with

the evidence introduced, and that the plaintiffs were allowed to open and conclude on the case as a whole. We see no error in this. Had the demurrer been heard separately at the proper time, upon the single question whether or not the petition made out a case to warrant the grant of the equitable relief sought, the defendants would undoubtedly have been entitled to open and conclude the argument; but where, at an interlocutory hearing, the entire case is heard, to determine whether the plaintiff is entitled to equitable relief, the demurrer has no special or favored standing as to the argument, and it is not error to grant the opening and conclusion to the plaintiff on the whole case.

The foregoing disposes of the material questions made by the bill of exceptions. Some of the grounds of the demurrer are not true in fact; as, for instance, those which raise the point that the petition does not allege that the defendants are insolvent, and that it fails to show that the plaintiffs own one third of the unsecured debts of the insolvent corporation. Further comment upon these points is of course unnecessary. A careful examination of the entire record convinces us that the judgment of the court below should not be disturbed.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

HENDERSON *et al.* v. STATE OF GEORGIA.

A judgment refusing to allow a general demurrer to a petition to be amended is not a final judgment; nor would a judgment allowing the amendment have been a final disposition of the cause, so as to authorize a writ of error to the judgment first named while the case was pending in the trial court. Under such circumstances the writ of error is premature and must be dismissed.

Argued May 25, — Decided June 17, 1905.

Action on bond. Before Judge Roberts. Irwin superior court. October 31, 1904.

Suit was brought in the name of the State against the sureties on the bond of a former ordinary, to recover an amount which it was alleged was due the State under the provisions of the act of 1872 (Acts 1872, p. 57), relating to the sale of certain lands which had never been granted by the State, or which had reverted to it. The defendants filed a general demurrer, in which it was

averred that "No legal or equitable cause of action is set forth," and also filed a special demurrer. The demurrers were sustained, and the State excepted. When the case reached this court (120 Ga. 780) it was argued that the demurrer was properly sustained, because the act of 1872 was unconstitutional; but this court reversed the judgment, and declined to decide this question, upon the ground that a general demurrer of the character above indicated was not sufficient to raise the question of the constitutionality of a statute upon which the action was based. When the case reached the court below, the defendants moved to amend the general demurrer, by averring that the act of 1872 was unconstitutional for the reason that it contained matter different from what was indicated in its title, the amendment setting forth specifically and in detail the matter which it was alleged was not covered by the title. The court refused to allow the amendment, and the defendants excepted.

Warren Grice, for plaintiffs in error.

John C. Hart, attorney-general, and *Haygood & Cutts*, contra.

COBB, J. In the case of *Newman v. State*, 101 Ga. 534, this court treated the question of the constitutionality of an act as having been raised under a general demurrer which alleged that the presentment did not charge the defendant with any violation of law; and the writer said in the opinion (page 536) that "under the general demurrer the constitutionality of the law under which the accused was arraigned is brought in question." But the question of practice was not directly raised in that case, and the expression of the writer was not one which was well considered. In *Savannah Railway Co. v. Hardin*, 110 Ga. 433, this question of practice was thoroughly considered by the court, and the opinion in that case sets forth the views of the writer after mature thought and diligent investigation. The ruling in the *Hardin* case has been subsequently followed without exception. It has been held that a demurrer can not be amended, at a term subsequent to the first term, by adding a ground of special demurrer. *City Council of Augusta v. Lombard*, 101 Ga. 724. A defendant may at any time before verdict, either orally or in writing, move to dismiss the case on the ground that the petition sets forth no cause of action, and in such a motion urge

any ground which would be sufficient as a basis of a motion in arrest of judgment. *Kelly v. Strouse*, 116 Ga. 883 (5). A paper filed after the first term, which is styled a demurrer, but which is really in the nature of a motion to dismiss for want of a cause of action, should be treated by the court as of the latter character. *M. & B. Ry. Co. v. Walton*, 121 Ga. 276 (2). In the present case the court treated the motion of the defendants as a motion to amend the demurrer, and not as a motion to dismiss, merely refusing to allow the amendment, which was in effect a refusal to decide the question raised by the amendment. The judgment of the court which is complained of was not a final judgment, nor would a judgment allowing the amendment have been a final disposition of the cause. The case is therefore here prematurely, and the writ of error must be dismissed. Civil Code, § 5526.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent, and Fish, P. J., disqualified.

PAULK v. ENSIGN-OSKAMP COMPANY *et al.*

1. In an equitable proceeding against a resident defendant and a foreign corporation, to cancel a conveyance of timber made by the former to the latter, wherein the title to the timber was warranted, and also to cancel an extension of a timber lease originally executed to the resident defendant by a third person, which extension was made subsequently to the conveyance of the same timber by the resident defendant to the foreign corporation, the resident defendant was a necessary party.
2. A suit in a State court is not removable to the United States court on motion of a non-resident defendant, on the ground of diverse citizenship, when it appears that the codefendant of the non-resident is an indispensable party against whom substantial relief is prayed.

Argued May 25, — Decided June 17, 1905.

Removal to U. S. court. Before Judge Roberts. Irwin superior court. November 2, 1904.

T. M. Paulk brought an action against the Ensign-Oskamp Company, a non-resident corporation, and H. H. Tift, praying for an injunction to restrain the defendants from cutting and removing the timber upon a certain described tract of land, and for the cancellation of a certain lease from William Paulk to H. H. Tift

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and a lease from Tift to the Ensign-Oskamp Company, together with an extension of the original lease from William Paulk to H. H. Tift. The petitioner alleged that he was the true owner of all the timber suitable for sawmill purposes upon the described land; that on March 19, 1900, William Paulk conveyed the said lot of land to petitioner, who recorded his deed on March 14, 1901; that, previously to the execution and delivery of the aforementioned deed, William Paulk, on August 14, 1897, sold and by lease conveyed to H. H. Tift the sawmill timber upon the described lot of land; that said conveyance provided that Tift and his assigns should have the free use and enjoyment of the timber for the purposes therein stated, for the full term of six years from the 14th day of August, 1897; that thereafter, on October 28, 1898, Tift signed, sealed, and delivered his conveyance of the timber, together with other timber, to the Ensign-Oskamp Company, in which conveyance Tift warranted to the Ensign-Oskamp Company the timber purchased from William Paulk for the term of six years from the date of the boxing of the timber for turpentine purposes; that in 1899, the Ensign-Oskamp Company procured from William Paulk an instrument in writing purporting to be an extension of the time of the original deed to H. H. Tift, so that the lease would expire six years after the boxing of the timber for turpentine purposes, which extension was without consideration, nor was there any consideration recited therein; that the extension of said lease was a fraud, because it was without consideration and too indefinite and uncertain to be enforced; that the Ensign-Oskamp Company was threatening to enter upon said land under their pretended claim of right and to cut and remove the timber therefrom; and that the extension of the lease and conveyance from Tift to the Ensign-Oskamp Company is a cloud upon petitioner's title. At the appearance term the Ensign-Oskamp Company presented their petition for removal of said cause to the circuit court of the United States for the southern district of Georgia, alleging that the amount involved was more than \$2,000; that it was a corporation of the State of West Virginia, and that its codefendant was neither a necessary nor indispensable party to said suit; that no substantial relief was prayed against its codefendant, and that the whole controversy could be disposed of by a decree between the plaintiff and the non-

resident corporation. The court passed an order directing a removal of the cause to the United States court as prayed, and the plaintiff excepts to this judgment.

Quincey & McDonald and *McDonald & Quincey*, for plaintiff.

Ellis, Wimbish & Ellis and *Fulwood & Boatwright*, for defendants.

EVANS, J. (After stating the facts.) Only one question is presented by this record, and that is, whether, under the allegations of the petition of T. M. Paulk against H. H. Tift and the Ensign-Oskamp Company, the resident defendant, Tift, is a necessary party. The prayer of the petition is for a cancellation of the extension of the lease from William Paulk to H. H. Tift, and so much of the conveyance of Tift to the Ensign-Oskamp Company as purported to convey the sawmill timber upon the land described for a period of six years from the boxing of the timber for turpentine purposes. It will be observed, from the allegations in the petition, that Tift warranted to the Ensign-Oskamp Company the timber included in the conveyance. For the reasons alleged in his petition the plaintiff prays a cancellation of these two conveyances. Tift was liable upon his warranty to the lumber company, and his conveyance can not be cancelled and declared void in a suit against the lumber company without making him a party. In the cancellation of a deed the grantor is a necessary party. *Palmer v. Inman*, 122 Ga. 226. Besides, the allegation is that the extension of the lease alleged to be void for lack of consideration is a lease, not to the lumber company, but to Tift. It is true that the petition alleges that the lumber company procured this extension of the lease after the conveyance of the timber by Tift to it; but while the benefit flowing from the extension of the lease may be to the lumber company, still the person to whom the extension is made is not the lumber company, but the resident defendant. Tift, therefore, was interested not only in the cancellation of the extension of the lease, but also in the vacation of his deed in which he had warranted the title of the timber to the lumber company, and he was, accordingly, a necessary and indispensable party; and the court erred in removing the cause on the ground of diverse citizenship.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

UNION CENTRAL LIFE INSURANCE COMPANY v. WYNNE.

FISH, P. J. 1. Where a plea sets up matter which, if sustained by competent written evidence, would constitute a good defense to the action, and it does not appear from the plea itself that the defendant depends for its establishment upon parol evidence, the plea should not be stricken on general demurrer. *Brown v. Drake*, 101 Ga. 180; *Walker v. Edmundson*, 111 Ga. 454. See also *Anderson v. Hilton & Dodge Lumber Company*, 121 Ga. 688.

2. The terms of an absolute unconditional promissory note can not be varied by engrafting upon it a condition made by a parol contemporaneous agreement. Civil Code, §§ 3675 (1); 5201. Upon the trial of an action on such a note given for the premium on an insurance policy, evidence of a parol contemporaneous agreement, between the maker of the note and an agent of the payee, that the policy was to be delivered within a given time, was, in the absence of fraud, accident, or mistake, inadmissible, in connection with proof that the policy had not been so delivered, to show failure of consideration of the note.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Submitted May 25, — Decided June 17, 1905.

Complaint on note. Before Judge Roberts. Dodge superior court. December 29, 1904.

J. E. Wooten, for plaintiff. *W. M. Clements*, for defendant.

FLETCHER *et al.* v. FLETCHER.

1. When a tenant places a subtenant in possession and the latter remains in possession beyond the term, the original tenant is to be regarded as holding over beyond his term, and a summary joint proceeding for possession against him and the subtenant is authorized.
2. In such a proceeding a judgment in favor of the plaintiff for the possession of the premises should be entered against both of the defendants, and a judgment for double rent against the original tenant only.
3. Those portions of the charge which were objected to were not erroneous for any reason assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly submitted to the jury the controlling issue in the case. The evidence amply warranted the verdict; and no reason appears for reversing the judgment.

Argued May 25, — Decided June 17, 1905.

Eviction. Before Judge Roberts. Irwin superior court. December 31, 1904.

Joe Fletcher made affidavit before a justice of the peace, that he was the owner of a described parcel of land; that he had rented the same to George H. Fletcher for the year 1901; that the term had expired, and he desired possession; that George H. Fletcher and one David Christmas were holding possession as tenants holding over; and that he had demanded possession of each of them since the expiration of the term, and they had refused to deliver possession to him. The affidavit was amended by adding an averment that Christmas was holding under George H. Fletcher and claiming possession as a subtenant of George H. Fletcher, and that they were holding over beyond the term. George H. Fletcher and Christmas each filed a counter-affidavit and gave bond. The papers were returned to the superior court for trial. The defendants moved to dismiss the proceeding, on the following grounds: (1) The affidavit fails to allege that the plaintiff had consented that Christmas should become the subtenant of George H. Fletcher, or the tenant of plaintiff. (2) George H. Fletcher and Christmas could not be proceeded against jointly. (3) Unless the plaintiff consented that Christmas should become the tenant of George H. Fletcher, Christmas was an intruder and should have been proceeded against as such. The court overruled this motion, and the defendants excepted *pendente lite*. The trial resulted in a verdict in favor of the plaintiff for the possession of the premises and fifty dollars rent. Upon this verdict a judgment was entered that possession be delivered to the plaintiff, and that he recover of the defendants fifty dollars rent and costs. The defendants made a motion for a new trial, which was overruled. They excepted, assigning error upon the judgment overruling the motion to dismiss, and upon that overruling the motion for a new trial.

McDonald & Quincey, for plaintiffs in error.

L. Kennedy and *E. D. Graham*, contra.

COBB, J. 1. When a tenant, either with or without the consent of the landlord, sublets the premises and places the subtenant in possession, and the latter, claiming only under the tenant, remains in possession after the term has expired, such possession is a holding over of the tenant, and authorizes a proceeding by the landlord against the tenant as a tenant holding over. A tenant holding over is liable for double rent, and he can not

evade this liability by so arranging the possession that the same is not actually in him, but in another claiming under him. The landlord is permitted, under certain circumstances, either during the term or after it has expired, to treat the subtenant as his own tenant and to proceed against him as such, either for rent or for possession. *Hudson v. Stewart*, 110 Ga. 37, and cit. But the landlord is not compelled to do this; he may still treat the person with whom he dealt as his tenant, and nothing done by such person can relieve him from any of the liabilities to the landlord which the relation imposes. The purpose of the summary proceeding which the law gives against a tenant holding over is to oust the tenant and place the landlord in possession. If the landlord sees fit to treat the subtenant as his tenant and proceed against him as such, he can not afterwards hold the original tenant to any liability for double rent; for this liability arises under the statute and is an incident to the proceeding to oust the tenant. The landlord is therefore entitled by this summary proceeding to have possession delivered to him and a judgment against his tenant for double rent. To completely accomplish the purpose of the statute and give to the landlord a judgment for double rent against the person with whom he has dealt, it is, therefore, necessary that the proceeding should be so directed that the actual occupant would be ousted and a judgment for the double rent entered against the tenant. This can not be accomplished unless both the tenant and the subtenant are parties to the proceeding. The affidavit as amended set forth the exact condition of affairs as they existed. The tenant was holding over, not by himself but by another, and the landlord desired possession from the subtenant and a judgment for double rent against the tenant. This could be accomplished by making them both parties to the proceeding. In *Richardson v. Harvey*, 37 Ga. 229, there is a dictum by Mr. Chief Justice Warner to the effect that in a proceeding against a subtenant to evict him as a tenant holding over, it was discretionary with the court whether the original tenant should be made a formal party to the proceeding; that he could defend in the name of the subtenant; but that the court might permit him to be made a formal party if it saw fit to do so. In that case the court had refused to allow the tenant to be made a party; and this judgment was not

reversed, simply for the reason that it appeared from the record that he had not been deprived of any substantial right by this ruling, as his defenses had been fully made in the name of his subtenant. If in a proceeding against the subtenant, where the landlord has elected to treat him as his tenant, the original tenant could, in the discretion of the court, be made a party defendant, it would seem for a stronger reason that the landlord, at the inception of the proceedings, could make both the original tenant and the subtenant or actual occupant parties to the eviction proceedings. There was no error in overruling the motion to dismiss the proceeding. In the case of *Grizzard v. Roberts*, 110 Ga. 41, the persons who were sought to be made parties in the proceeding claimed to be the owners of the land and desired to set up a claim adverse to that of the landlord, alleging that the defendant was their tenant. They were entire strangers to the only issue made by the proceeding, and therefore could not under any circumstances be made parties to the case.

2, 3. The motion for a new trial contains numerous grounds, assigning error upon extracts from the charge, and upon the refusal of various requests to charge. The case turned upon the question whether Christmas had gone into possession, before the term expired, as the tenant of George H. Fletcher, or as the tenant of the plaintiff, or whether George H. Fletcher had, during the term, abandoned possession, Christmas entering as an intruder and having no connection with George H. Fletcher, and after the term had expired made a contract of rental with George H. Fletcher, who then claimed to be the owner of the premises by a title paramount to that of the plaintiff. This issue was fairly submitted to the jury under the judge's charge. Those portions of the charge that were excepted to were not erroneous for any reason assigned, and the requests to charge, so far as legal and pertinent, were covered by the general charge. The evidence fully authorized the finding that the possession of George H. Fletcher during the term and the entry of Christmas were the result of a collusive arrangement to defeat the rights of the plaintiff; and therefore neither Christmas nor George H. Fletcher could, as against the plaintiff in the proceeding to oust them from possession as tenants holding over, set up a title adverse to the plaintiff until they had surrendered possession to him. *Grizzard v. Roberts*,

supra. While the proceeding was properly brought against George H. Fletcher and Christmas for the possession, we think that Christmas is not liable to the plaintiff for double rent, and that the judgment for rent should have been entered against George H. Fletcher alone. Direction is given that the judgment be so amended as to be a judgment for possession against both of the defendants, and a judgment for the double rent against the defendant Fletcher only. There was no error requiring a reversal.

Judgment affirmed, with direction. All the Justices concur, except Simmons, C. J., absent.

SOUTHERN RAILWAY COMPANY v. EDMUNDSON.

Where it is shown that the baggage of a passenger was received by the carrier at the plaintiff's destination, and there is a total default to deliver the same on demand, the onus of accounting for such default is on the carrier. The evidence authorized the judgment for the plaintiff, rendered by the judge who tried the case without a jury.

Submitted May 25 — Decided June 17, 1905.

Action for damages. Before Judge McRae. City court of McRae. November 15, 1904.

Mrs. Georgia Edmundson, in her petition against the Southern Railway Company, alleged that the defendant had endamaged her in the sum of one hundred dollars, by reason of the following facts: That she boarded a train of the Atlantic Coast Line Railroad Company at Tampa, Florida, for Helena, Georgia, having previously purchased a ticket and checked her baggage, which was a valise, to her destination; that upon her arrival at Helena she presented her check to the defendant and demanded her baggage, but the defendant failed and refused to deliver the same to her, and still fails and refuses so to do or to pay her the value thereof; that the defendant contracted and agreed to receive the valise from the initial railroad at the junction point of defendant, and safely carry the same to Helena and there deliver it to petitioner; that the defendant did so receive it from the connecting road in good condition, and transported it to Helena, Georgia. The contents of the valise and its value were alleged. The defendant was alleged to be guilty of negligence in failing and

refusing to deliver to plaintiff the valise and its contents. Petitioner further alleged that the valise and its contents were taken and feloniously appropriated by some of defendant's agents, servants and employees. The defendant in its plea denied certain paragraphs of the petition, and required proof of others, because of want of sufficient information to either admit or deny them. The defendant further specially pleaded that it had exercised all care and diligence required of it in the protection of plaintiff's baggage, and was, therefore, not liable to her in any sum. The case was tried by the judge without a jury, and on the trial the plaintiff's testimony supported the allegations in the petition as to purchasing a ticket at Tampa, Florida, and checking the baggage to Helena. The plaintiff further testified, that she left Tampa at eight o'clock p. m., and arrived at Helena at 3:45 o'clock p. m., the next day; that upon her arrival she could not find the agent of defendant, but delivered the check to a friend and directed him to get her baggage; that the baggage was demanded that day, but not delivered; that she went out to her father's that afternoon, and about a week later she again sent for her baggage; but that she has never received the valise or its contents. She testified as to the contents of the valise and its value. Another witness for the plaintiff testified, that he presented the check to the agent of defendant, about two weeks after the baggage arrived at Helena, and demanded the valise, and that the agent directed him to a porter, but the porter could not find the valise. The defendant offered as a witness its agent at Helena, who testified that the plaintiff arrived at Helena on the northbound train at 3:45 p. m., that one Mr. Dean, for the plaintiff, asked for her "grip," and that he informed him that it had not come, but would doubtless be in on the night train; that the valise came that night on the northbound train and remained in the baggage-room for two weeks; that the "grip" was a common cloth one, bound with one strap, which was fastened with a buckle; that the witness was informed by the plaintiff that it contained baby clothes; and that had he known of its value he would have kept it in the office with him instead of in the baggage-room; that the baggage room is not in the same building with the office, but is across the tracks in the old depot; that any one might have stolen it from the baggage-room; witness

saw it there several times and kicked it out of his way; it remained there to his knowledge for at least two weeks; all the baggage was kept in the baggage-room, but it was not kept locked all through the day; any one could have gone there without witness's knowledge and stolen the valise; that the baggage room was frequently allowed to remain open all day with no one to watch it; the railroad company had a man to handle baggage, but he did not stay at the baggage-room all the time. The judge rendered a judgment for the plaintiff. The defendant moved for a new trial, upon the usual grounds, and upon the additional ground that the allegations were not supported by the proof. The motion was overruled, and the defendant excepted.

DeLacy & Bishop, for plaintiff in error.

D. C. McLennan, contra.

EVANS, J. (After stating the facts.) The plaintiff's suit was based upon the negligence of the defendant's agents. It was alleged, first, that the "agents, servants, and employees" of the defendant had misappropriated her baggage to their own use. It was further alleged that the defendant was guilty of a breach of duty in failing and refusing to deliver the valise and contents to the petitioner. Counsel for plaintiff in error insist that these two allegations should be construed together, and that in effect the petition alleged the liability of the defendant was because of the fraudulent misappropriation of the baggage by the defendant's agents and employees, and that the evidence wholly failed to sustain this charge. We can not agree with the counsel in their construction of the plaintiff's petition. The suit was for the failure to deliver the baggage. This was alleged to have been as the result of defendant's negligence. The further allegation that the baggage had been misappropriated by the defendant's employees was a statement of an additional reason why the defendant failed to deliver. Construing the petition, therefore, as a suit for failure to deliver baggage, the evidence authorized the plaintiff to recover its proved value. While under the facts the defendant most probably was not liable as a carrier, because of the lapse of time after the arrival of the baggage before the demand upon the agent, it certainly was liable to the plaintiff as a warehouseman. *Ga. R. Co. v. Thompson*, 86 *Ga.* 327. The defendant's possession of the baggage and the plaintiff's demand

for the same are admitted. "Where there is a total default to deliver the goods bailed, on demand, the onus of accounting for such default is on the bailee." *Rome Railroad v. Wimberly*, 75 Ga. 320; Civil Code, § 2896. The defendant company was bound to account for the valise and to show how it left its custody. The evidence which it submitted established that it was grossly negligent. It had put the baggage in a room which was frequently left open during the day under no proper surveillance by any of its agents. The valise was a cheap one, and the agent treated it contemptuously by kicking it out of his way, instead of exercising proper diligence in putting it in a place of safety. There was a failure by the railroad company to exercise proper care in the protection of the plaintiff's baggage, and its loss occasioned by the lack of such care rendered the defendant liable to the plaintiff.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

TOOMER v. WARREN.

FISH, P. J. 1. The material facts of this case being substantially the same as those involved in *Bell v. Dawson Grocery Company*, 120 Ga. 628, the rulings there made are controlling in the present case.

2. It is only where discovery is expressly prayed for in plaintiff's petition that two witnesses, or one witness and corroborating circumstances, are required to rebut the answer of defendant, as to facts within his own knowledge, responsive to the discovery sought. Civil Code, § 8950; Acts 1898, p. 53.

3. A judgment overruling a demurrer to a petition for injunction and receiver, rendered upon an interlocutory hearing in vacation before the appearance term, is a mere nullity. *Reynolds & Hamby Co. v. Kingsbery*, 118 Ga. 254.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued May 25, — Decided June 17, 1905.

Injunction and receiver. Before Judge Martin. Pulaski superior court. April 7, 1905.

W. D. Nottingham and D. R. Pearce, for plaintiff in error.
W. L. & Warren Grice and T. S. Felder, contra.

MARTIN v. THE STATE.

If a person, fraudulently intending to get possession of the money of another and appropriate the same to his own use, by false representations induces the owner to deliver the money to him for the purpose of being applied for the owner's use or benefit, and then appropriates it in pursuance of the original intent, he is guilty of both larceny after trust delegated and simple larceny, and may be prosecuted for and convicted of either offense.

Argued May 15,—Decided June 17, 1905.

Accusation of simple larceny. Before Judge Hodges. City court of Macon. March 25, 1905.

M. G. Bayne, for plaintiff in error.

William Brunson, solicitor-general, contra.

FISH, P. J. Martin was tried, in the city court of Macon, under an accusation charging him with simple larceny, in that he wrongfully and fraudulently took and carried away twenty-five dollars in money of the lawful currency of the United States, of the personal goods of Sam Lewis, with intent to steal the same. Lewis testified, that, anticipating that a case would be made against him, in the recorder's court of the City of Macon, for striking a woman named Lethia, he called on Martin for advice, and the latter informed him that he, Martin, would see the recorder and settle the matter. A few days later Martin told Lewis he had seen the recorder, who said the case could be settled for \$23. Lewis thereupon gave Martin \$25 in lawful currency of the United States, telling him to settle the case and with the balance of the money procure a license for Lewis to marry Lethia. Martin was to get the papers, settling the case, and deliver them to Lewis. Some three weeks later Lewis made inquiries of Martin as to the matter, and Martin informed him that he, Martin, had paid the money to the recorder and settled the case, and, upon Lewis asking him for the papers, stated that he had not procured them. Lewis never got the money back from Martin, nor did Martin procure the marriage license for him. The State also introduced evidence to the effect that no case had been made against Lewis in the recorder's court; that neither the recorder nor any officer of the city had ever agreed to settle any case or charge against Lewis; and that Martin had never paid the recorder or any other official of the

city any money in settlement of any case or charge against Lewis. The accused introduced no evidence, but made a statement in which he said, that Lewis gave him \$25 to keep for him and to pay his fine when the case should be made against him; that Lewis had never asked him for the money, and that he still had it and was keeping it to pay the fine; that he had not seen Lewis since he gave him the money, until he was arrested; and that he never had intended to use the money for his own benefit. The accused was found guilty of the offense charged. He moved for a new trial, which was refused, and he excepted.

If a person obtains possession of goods or money by trick or fraud, or under false pretense of a bailment, with intent to appropriate the thing to his own use, and the owner intends to part with the possession only, and not with the property, the possession is obtained unlawfully, and the subsequent appropriation in pursuance of the original intent is larceny. Clark's Crim. Law, 262; 1 Bish. Crim. Law, § 583; *Harris v. State*, 81 Ga. 758; *Cunnegin v. State*, 118 Ga. 125; *Johnson v. State*, 119 Ga. 563. The charge excepted to, being in accordance with this principle, was not erroneous; and applying the charge to the evidence, the jury were fully authorized in finding the accused guilty of simple larceny. It is true that the evidence also made out a case of larceny after trust (*Walker v. State*, 117 Ga. 544); but as the accused, in the same transaction, committed both simple larceny and larceny after trust, there is no legal reason why the State could not prosecute and convict of the lesser offense, simple larceny, as the common-law rule of merger of crimes, where one is a misdemeanor and the other a felony, does not prevail in this State. *Watson v. State*, 116 Ga. 607. We are not unmindful of the fact that in *Mobley v. State*, 114 Ga. 260, it was held that where the evidence showed that the accused was guilty of larceny after trust, he could not legally be convicted of simple larceny; but in that case there was no evidence that the accused had committed simple larceny as well as larceny after trust. There the accused was voluntarily intrusted with the money, which he subsequently appropriated to his own use. He did not obtain possession of the money by any trick, fraud, or false pretense, with intent to steal it. So, while the ruling announced was too broad, the case was

correctly decided on its facts. Every case of larceny after trust does not include simple larceny, but both offenses may be committed in the same transaction.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

TUGGLE, administrator, v. ENTERPRISE LUMBER CO.

A private business corporation created under the laws of this State, with its principal office in a given county, can not be sued in another county for a trespass committed therein, when it has no agent, agency, or place of business in the latter county.

Argued May 25, — Decided June 17, 1905.

Action for damages. Before Judge Roberts. Irwin superior court. October 25, 1904.

W. S. Florence and McDonald & Quincey, for plaintiff.

Ellis, Wimbish & Ellis, for defendant.

FISH, P. J. W. R. Tuggle, as administrator de bonis non of the estate of Robert Tuggle, deceased, brought an action for damages against the Enterprise Lumber Company, for alleged cutting, by the defendant company, of timber on land in that county belonging to the estate of plaintiff's intestate. The petition alleged the defendant company to be a corporation of this State, with its principal office in Fulton county. Service was made by serving copy of second original, issued from the superior court of Irwin county, on the vice-president and general manager of the defendant company, at its place of business in Fulton county. The defendant demurred to the petition, on the ground that it showed on its face that the court had no jurisdiction of the defendant, or of the cause of action, as it was alleged that the defendant was a domestic corporation with its principal place of business in the county of Fulton, and that the petition failed to allege that at the time the timber was alleged to have been cut, or at the time suit was filed, or at any time, it had an office and transacted business in Irwin county, or at any time had an agent or place of business in that county. The demurrer was sustained, and the case dismissed. The plaintiff excepted.

The single question presented for decision is one of law, which may be stated as follows: Can a private business corporation created under the laws of this State, with its principal office in Fulton county, be sued in Irwin county for a trespass committed in the latter county, when it does not appear that the corporation sued has ever had an agent, or agency, or place of business therein? The solution of the question depends upon the proper construction of the Civil Code, §1900, which provides: "Any corporation, mining or joint-stock company, chartered by authority of this State, may be sued on contracts in that county in which the contract sought to be enforced was made, or is to be performed, if it has an office and transacts business there. Suits for damages, because of torts, wrong or injury done, may be brought in the county where the cause of action originated. Service of such suits may be effected by leaving a copy of the writ with the agent of the defendant, or, if there be no agent in the county, then at the agency or place of business." It is clear that an action against a domestic corporation, mining or joint-stock company, on a contract, can not, under this section, be brought in a county unless the defendant has an office and transacts business therein. As to suits for damages because of torts, wrong or injury done, the section declares they may be brought in the county where the cause of action originated. If the section went no further, the meaning would be plain, that such suits might be brought in the county where the cause of action originated, whether the defendant, at the time the suit was instituted, had an office and transacted business in that county or not. The section, however, proceeds to say that "service of such suits may be effected by leaving a copy of the suit with the agent of the defendant, or, if there be no agent in the county, then at the agency or place of business." "Such suits" evidently refers to "suits for damages because of torts, wrong or injury done," and it is clear that if the defendant has an agent in the county where the tort, wrong, or injury was done, then service may be effected by leaving a copy of the writ with him; but in the event there be no agent in the county, then the section provides that service may be perfected by leaving a copy of the writ "at the agency or place of business." "The agency or place of business," we think, refers to the same place; that is, "the agency" and the

"place of business" are synonymous. At what "agency or place of business," then, may the copy of the writ be left? At the principal place of business? We do not think the statute means this; because it can not be said that a corporation, mining or joint-stock company, has an agency in its home office or principal place of business; and moreover, if this were the intention, it seems that the statute would have so declared. Nor do we think it means that such a defendant may be served by leaving a copy of the writ at any agency or place of business in any county in the State where it may happen to have an agency or place of business. What reason could there be for allowing such defendant to be sued in a county in the extreme southern portion of the State, where the cause of action originated, and service of the suit to be effected by leaving a copy of the writ at an agency or place of business of the defendant in a county in the extreme northern section of the State? Considering the whole section, we think its purpose is to permit suits against domestic corporations, mining or joint-stock companies, because of torts, wrong or injury done, to be brought in the county where the cause of action originated, provided the defendant has an agent, agency, or place of business in such county; and if the agent be in the county, service is to be perfected by leaving a copy of the writ with him; but if he, for any reason, is not there, then copy of the writ is to be left at the agency or place of business in that county. It follows, from this interpretation of the section in question, that the court properly sustained the demurrer to the petition. In *Gillis v. Hilton & Dodge Lumber Co.*, 113 *Ga.* 622, relied on by counsel for plaintiff in error, it appeared that the Hilton & Dodge Lumber Co. had, at the time the suit was instituted, an agent and an office in the county where the action was brought, and transacted business at its office in that county.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

COKER *et al.* v. ATLANTA, KNOXVILLE AND NORTH-
ERN RAILWAY COMPANY *et al.*

123	483
124	291
d124	292
124	628
123	483
125	488
126	257
126	256

1. A municipal corporation is without power to vacate a public thoroughfare, unless authority so to do be conferred upon it in express terms or by necessary implication.
 - (a) The charter of the City of Atlanta clothes it with no such power.
 - (b) Authority "to open, lay out, to widen, straighten, or otherwise change" streets within the city does not comprehend the power to abandon a thoroughfare and open another to take its place over a strip of land running parallel with, but some twenty-six feet distant from, the nearest boundary line of the street sought to be vacated and devoted to a purpose inconsistent with its use by the public.
2. Though the unauthorized obstruction of a city street by the laying of railway tracks and the erection of permanent structures thereon may, as matter of law, amount to a public nuisance, none save persons who will thereby sustain injury not shared in by the public at large can maintain an equitable proceeding to enjoin the creation of such nuisance.
3. One whose property rights will be injuriously affected by the unauthorized abandonment and obstruction of a street which furnishes an important avenue of approach to his place of business, in that the closing of the street will divert travel from the thoroughfare on which his property is situated and render the same less valuable and less remunerative to him, can maintain an action to prevent the infliction of such special injury.
4. That great benefits will flow to a city from the carrying out of an ultra vires contract made in its behalf affords no reason for denying appropriate equitable relief to a citizen who attacks the contract as illegal, and whose rights will be infringed if its terms are given effect.
5. There is no merit in the defense that a property owner will not sustain damage from the unlawful closing of a street, for the reason that another street to take its place will be immediately opened, unless it be shown that the street to be opened will be permanently maintained.
 - (a) Evidence that the street to be substituted for that closed will afford better access to the complainant's property and will render it more valuable is not open to the objection that benefits thus arising can not be set off against the damages which he would sustain from the unauthorized abandonment and obstruction of the street to the closing of which he objects.
 - (b) After an ultra vires contract wherein a municipality is named as a party is wholly or partially performed by the other contracting party, a court of equity can not undertake to enjoin the city authorities from restoring to that party such fruits of the unauthorized contract as have not been dissipated but remain in the custody of the municipality.
6. Even though a citizen may by his conduct induce the authorities of a city to believe that he will not question the validity of an ordinance providing for the vacation of a public thoroughfare, he will not be estopped from attacking the ordinance at any time before definite action is taken thereunder by the parties interested in giving it effect.

Petition for injunction. Before Judge Lumpkin. Fulton superior court. March 14, 1905.

The Atlanta, Knoxville and Northern Railway Company undertook to secure, for the joint benefit of itself and other railroad companies with which it was associated, terminal facilities in the City of Atlanta, affording access to Central avenue, in the heart of the city. As a part of the project, the railway company desired to acquire title to a street known as Waverly place, which divided property it had purchased from the freight-yards of one of the companies with which it was associated; to also acquire title to a lot upon which stood one of the fire-engine houses belonging to the city; and to secure the privilege of crossing certain streets intersecting a right of way leading to the property which the railway company had purchased for use as a terminal station. The City of Atlanta, acting through its general council, indicated a willingness to encourage and foster the enterprise, and negotiations between the railway company and the city council were entered into, with a view to granting to the railway company the desired privileges and conferring upon it the right to use Waverly place as it might see fit. The City of Atlanta also had a purpose of its own in view; it much desired to acquire the right to construct a viaduct across the railroad-yards of the companies associated with the Atlanta, Knoxville and Northern Railway Company, and to get from the railroad companies substantial aid in the building of this expensive structure from Washington street, on the south, to Collins street, on the north of the railroad yards. As a result of the negotiations, the city council, on December 23, 1904, adopted an ordinance which provided, in substance, as follows: The railway company was to be granted, (1) the privilege of crossing the streets intersecting its right of way to the proposed terminal station; (2) the city's fire-engine lot; (3) the street known as Waverly place; and (4) the right to cross with its tracks a portion of Washington street, at a grade which would admit of trains passing under the proposed viaduct. On the other hand, the city was to acquire from the railway company, (1) a right of way for the viaduct across the railroad-yards; (2) the sum of \$50,000 to be used in building this viaduct; (3) a lot in the neighborhood upon which should be erected by the railway company a modern fire-engine

house to take the place of that granted to the railway company; and (4) the use of a street laid out across the property of that company south of Waverly place, and to be used in its stead till the city should take steps to build the viaduct and should receive from the company the \$50,000 to be used in its construction, when the strip of land laid out as a street across the railway company's property should be reconveyed to that company, provided the city was not prevented by legal proceedings from so doing, the \$50,000 to be paid to the city in any event. The railway company assented to the terms of the ordinance, and it was about to be carried into effect when F. M. Coker Jr. and W. S. Kendrick filed an equitable petition, therein naming the Atlanta, Knoxville and Northern Railway Company and the City of Atlanta as defendants, and praying that they be enjoined from proceeding under the ordinance to do anything affecting the existing status. Petitioners attacked the contract evidenced by the ordinance, as *ultra vires*, alleged that they were the owners of property in the immediate vicinity of Waverly place that would be injuriously affected by the closing and obstruction of that street, and denied any right or authority on the part of the city to vacate it or to grant to the railway company the privilege of using the same for railroad purposes.

On the hearing no attempt was made to show that any special injury to Kendrick would result from the closing of the street, but it did appear from the uncontradicted evidence that if Waverly place should be vacated and no thoroughfare taking its place should be substituted, the market value of certain property owned by Coker would depreciate from five to ten, or possibly twenty-five per cent. The fact was also brought out at the hearing, that, subsequently to the filing of the petition for injunction, the city council had in certain respects amended the ordinance complained of. The only change therein which need be noticed is the striking of the provision for the payment by the railway company of \$50,000, and the insertion in lieu thereof of the following stipulation: "Section 6. That the said railroad company, by accepting this ordinance, agrees and contracts with the City of Atlanta to pay a part of the expense or cost of the construction of said viaduct, corresponding to the amount needed to erect that part of the viaduct extending over

the tracks of the railroad from the abutment at Washington street to the abutment at Collins street, as shown on the plans of the original ordinance, approximating a distance of 393 feet; thus connecting the viaduct constructed to either side of said railroad property and completing said viaduct, provided the cost of such part of the same does not exceed \$80,000, any saving to be for the benefit of the railroad, its successors and assigns. The City of Atlanta will adopt a resolution directing the mayor to execute a conveyance in its name quitclaiming all the city's right, title, and interest in and to Waverly place, as changed, to the Atlanta, Knoxville & Northern Railroad Company, its successors and assigns, at the time said railroad company, its successors and assigns, shall pay their part for the construction of said viaduct, as above provided; and the good faith of the city is hereby pledged to accordingly secure said street to said railroad company and its successors and assigns; provided, however, that should the City of Atlanta be prevented by legal proceedings from making said quitclaim conveyance, the payment for said viaduct shall nevertheless be made as herein provided." To certain evidence offered by the defendants objection was made by the plaintiffs, and the court reserved its decision as to the admissibility of this evidence until a date subsequent to the hearing, at which time the objections were overruled and an order was passed denying the injunction prayed for. To these rulings exception is taken.

John L. Hopkins & Sons, for plaintiff. *King, Spalding & Little, J. L. Mayson*, and *W. P. Hill*, for defendants.

FISH, P. J. (After stating the facts.) 1. "The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority." 2 Dill. Mun. Corp. (4th ed.) § 666. "But the power must be conferred in express terms or by necessary implication, and the construction of ambiguous words alleged to confer it 'ought to be in favor of the common right of highway.' Highways can not, in any event, be discontinued for the purpose of devoting them to private and inconsistent uses." Elliott, Roads & Streets (2d ed.), § 875. Such is the law as heretofore announced by this court. *Marietta Chair Co. v. Henderson*, 121 Ga. 403-404. No express power to vacate a public

thoroughfare has been conferred by the General Assembly upon the City of Atlanta. On the contrary, its control over streets and alleys has been in terms limited to the right "to open, lay out, to widen, straighten, or otherwise change" the same. Acts of 1874, p. 131, § 60. To exclude the general public from the enjoyment of a street and to devote it to a purpose wholly inconsistent with its use as a thoroughfare is not such a "change" therein as the city's charter contemplates. That the city has power to abandon or vacate the street known as Waverly place was not claimed by counsel for the defendants in error, but their contention is that the "change" in that street provided for by the ordinance adopted by the city council is one which the municipality has power, under the above-quoted provision of its charter, to effect. The facts are: Waverly place is to retain its name, but change its residence, if the carrying out of the plan outlined in the ordinance is not interfered with. That street is but one block in length, and connects Central avenue on the west with Washington street on the east, the two streets last named running parallel to each other and at right angles to Waverly place. On the north adjoin the railroad-yards now used by the companies associated with the defendant railway company, while on the south lies property all of which is either owned or controlled by that company. Washington street extends no further north than the railroad-yards; Central avenue continues northward beyond them; both streets extend for a considerable distance southward and are much used thoroughfares, as is also Waverly place. The banking-house of Coker is on the west side of Central avenue and faces the open street called Waverly place. It is proposed to so change the location of the latter street as that it shall occupy a strip of land belonging to the railway company, of equal length and width, lying some twenty-six feet south of the present southern boundary of Waverly place where it connects with Central avenue and some thirty feet south of the point where its southern boundary touches Washington street. In other words, Waverly place is to be moved bodily over eighty-six feet in a southerly direction and deposited upon the lands of the railway company, over twenty-six feet distant from its extreme southern boundary as now located, so that its extreme northern boundary will be eighty-six feet away from its present northern

boundary. The journey involves eighty-six feet of travel, the street being sixty feet wide and every inch of it journeying southward; none of it is to remain at its present abode, but it is in its entirety to seek other quarters provided for it further down Washington street. The proposed "change" in Waverly place is one of location or residence, and after it moves there will be nothing to identify it but its name; for the ordinance contemplates that all luggage, in the shape of sidewalks and other personal effects, shall be left behind. The street is not an asset which the city can move from place to place at will. The so-called "change" in the street practically amounts to an entire abandonment of it as a thoroughfare and the opening of a new street through the property of the railway company. Under the ordinance adopted by the city council, that company can acquire no right, title, or interest in or to any portion of Waverly place; the contract which the city council sought to enter into with the railway company was clearly ultra vires, and the same is not enforceable at the instance of either party thereto. Not until power derived from the legislature is conferred upon the city can it become legally bound by, or have any right to enter into, such a contract as that embodied in the ordinance under discussion.

2. It does not follow, however, that merely because the city was without power to close Waverly place and permit the railway company to use it for terminal facilities, the plaintiffs were entitled to the injunction they sought against the railway company to prevent it from taking possession of the street or making any alterations therein. They are undoubtedly correct in their contention, that, as matter of law, the building of terminal structures in the street would amount to a public nuisance (*Daly v. Railroad Co.*, 80 Ga. 793), as would also the using of the street as a switching yard or place for the delivery of freight (*Atlantic & Birmingham R. Co. v. Montezuma*, 122 Ga. 1), or the unauthorized laying of its tracks longitudinally along the surface of the street. *Davis v. Railroad Co.*, 87 Ga. 605; *Augusta R. Co. v. Augusta*, 100 Ga. 701. But unless, from the unauthorized use of the street, the plaintiffs will suffer injury not common to the general public, peculiarly affecting their property rights and causing special damage to them, they can not maintain an action to either enjoin the nuisance or to re-

cover damages for its maintenance. *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *East Tenn. Ry. Co. v. Boardman*, 96 Ga. 356. It was admitted, on the hearing in the court below, that the railway company would, unless enjoined, occupy the strip of ground now known as Waverly place longitudinally with its tracks and terminal structures; and on the argument here counsel for the plaintiffs insisted that the banking-house of Coker would be depreciated in market and rental value, and the enjoyment of the property injuriously affected, by the noise, smoke, and cinders incident to conducting upon the street the operations of the railway company. However, no anticipated injury to Coker thus arising was either alleged or proved. His property does not abut on Waverly place, but is situated on the west side of Central avenue. The precise manner in which the railway company expected to use Waverly place was not shown, and that they expected to so use it as to injuriously affect Coker's property is purely a matter of inference. Bare conjecture can not adequately supply proper allegations and proof, and the court below would have been unwarranted in granting an injunction upon the assumption that the use to which the street was to be put would result in special damage to either of the plaintiffs.

3. If for any reason Coker was entitled to the relief sought, it was upon the theory that the unlawful closing of the street by the city and the placing of obstructions therein by the railway company would deprive him of the benefits of one of the principal avenues of approach to his place of business, rendering it less valuable and less remunerative to him. If such would be the result of the closing of the street, then Coker would be entitled to an injunction to prevent the visitation upon him of this special injury. *Georgia Southern R. Co. v. Harvey*, 84 Ga. 372, s. c. 90 Ga. 66; *Brunswick & Western R. Co. v. Hardey*, 112 Ga. 604; *Savannah & Western R. Co. v. Woodruff*, 86 Ga. 94; *S. F. & W. Ry. Co. v. Gill*, 118 Ga. 737, 745-6. The evidence introduced in his behalf showed that this would undoubtedly be the case in the event Waverly place were closed and no street to take its place were opened and maintained.

4. As a matter of defense, the defendants offered the affidavits of a number of persons who therein expressed their conviction,

based upon a knowledge of all the surrounding facts and circumstances, that the building of a viaduct from Washington street to the north side of the railroad-yards, so as to connect that street with thoroughfares in the northern portion of the city, was a great public necessity, and that the swap of the city's property and property rights for the property and property rights moving from the railway company was a most excellent business proposition and was to the undoubted advantage of the city and the citizens at large. This evidence was objected to as irrelevant, but was held by the court to be admissible. It should not have been taken into consideration. The issue was, not whether or not the city council had made a good bargain with the railway company, but whether or not that bargain was *ultra vires*.

5. The defendants also sought to overcome the *prima facie* case made out by the plaintiffs, by showing that the new street to be opened across the property of the railway company would not only fully take the place of Waverly place, but would afford better access to Coker's place of business and render his property more valuable. Evidence to this effect was objected to, but was held to be admissible. The plaintiffs' objections were that the evidence was irrelevant and immaterial, (1) because the unlawful occupancy of Waverly place by the railway company would be a public nuisance, and no benefits flowing to plaintiffs from the opening of the new street could be set off against the injury inflicted by closing Waverly place, and (2) "because the rights which the city would acquire in the proposed new street were not equal in character or nature with those which it possessed in the present Waverly place, the latter rights being perpetual, while the rights in the new street were conditioned upon the happening of the event provided for in the ordinance, at which time the right to use the strip of ground known as 'New Waverly place' would be lost to the city and the public." The first of these objections was not well taken. The purpose of the evidence was, not to set off benefits against damages, but to show that the closing of Waverly place, under the terms of the ordinance, would not result in any special injury to Coker or damage to his property. If such were the truth of the matter, he could have no standing in court as an aggrieved party. *Parkas v. Towns*, 103 Ga. 154.

The second objection is not to be so easily disposed of. The

ordinance imposed upon the city the moral, if not the legal, obligation of reconveying title to the new street to the railway company so soon as that company should comply with its undertaking to share the expense of building the viaduct, provided the city should not be "prevented by legal proceedings from making said quitclaim conveyance." In other words, the city was bound to reconvey and contracted to reconvey if within its power to do so. If it had the legal right to do so when called on by the railway company at the appointed time, then the new street would be legally closed and Coker would lose all benefits flowing from the substituted street. So if Coker is to be denied the privilege of objecting to the closing of Waverly place, on the ground that another and better street will be substituted for it, the fact must be made to clearly appear that the new street can not hereafter be legally closed at the will of the city, despite the express provision in the ordinance pledging the good faith of the city to reconvey it to the railway company unless "prevented by legal proceedings." Could the city be so prevented by any proceeding which Coker might hereafter bring to enjoin the closing of that street? Neither in his capacity of citizen and taxpayer nor in his capacity as property owner could he be heard to assert that he had any greater interest in the street than had the City of Atlanta, or stood in any better situation to object to the abandonment thereof. If the railway company proposed to make to the city a dedication of the new street, by way of gift and without condition, then the new street would stand upon the footing of other public thoroughfares, and could not be legally vacated at the will of the city. But the company does not contemplate any dedication to the public, but has entered into a cold business proposition to convey the proposed new street to the city, on condition that the city will reconvey the same, if within its power, in the event specified in the ordinance. Suppose Coker had waited till the city undertook to do so in accordance with its terms. Aside from being met with the charge of laches, he would have to overcome the difficulty of successfully pointing out some reasonable ground upon which a court of equity could base a right to interpose and enjoin the city from making a conveyance such as the ordinance calls for. That ordinance evidences an ultra vires contract which the court could not enforce or give recognition to.

Coker could not assert that it was valid in so far as it provided for a conveyance of the new street to the city, but invalid in so far as it provided for a reconveyance to the railway company; he could not in part ratify and in part repudiate the contract, or insist that the city was entitled to hold on to any of the fruits of the same. To return to the railway company so much of the fruits of this ultra vires bargain as had not been dissipated would be the equitable duty of the city, as to do so would be in accord with good conscience and would impose no burden nor injury upon any citizen, property owner, or taxpayer. See 1 Dill. Mun. Corp. (4th ed.) § 462, note; 29 Am. & Eng. Enc. L. (2d ed.) 54, and authorities cited. Certainly no court of equity could consistently undertake to interfere with such restoration, whether made under color of the ultra vires contract by way of compliance with its terms, or voluntarily under a proper recognition of the true character of the contract. The city could then reply to Coker: treating the ordinance as valid, no more is being done than the city is bound to do under its express terms; if the ordinance be invalid, as claimed, then it is the right and duty of the city to restore to the railway company the strip of land conveyed as a street, and to take proper steps to reopen Waverly place to the public. Even though the city might at the same time decline to take such steps, the court could not attempt to compel the city to take action, and Coker would be remitted to the remedy, pointed out in *Gill's* case, 118 Ga. 737, to have the nuisance created by the railway company in Waverly place abated at his instance, the city authorities not themselves exercising the right to have it abated in accordance with the provisions of the Civil Code, § 4762. Now, if ever, is the time for Coker to complain of the invalid ordinance and object to the closing and obstruction of Waverly place before the public nuisance therein is created; and the defense that he would suffer no injury because of the opening of the proposed new street was not tenable.

6. Counsel for the defendants in error call attention to the fact that there was no evidence going to show that Kendrick would sustain any special injury by the closing of the street to the public, and insist that Coker had by certain conduct, prior to the passing of the ordinance, estopped himself from setting up its invalidity. It appears, that, pending the negotiations between

the railway company and the city authorities, Coker attended some of the meetings of a special committee to which council had referred the matter of granting to the railway company the privileges for which it asked, that he was very actively in favor of the construction of the Washington street viaduct, and that he had expressed himself as willing to have Waverly place entirely closed up and abandoned, if the viaduct could be secured. But though Coker attended these meetings, he did not address the committee upon the subject under discussion, nor favor or acquiesce in the adoption of the ordinance which the city council passed. He did make to council a written proposition to loan to the city \$25,000 for six months, with interest at the rate of 4% per annum, this sum to be used in the construction of the viaduct according to the plans and specifications of file in the office of the city engineer; though this offer was not accepted. On the hearing below, counsel for Coker stated that he would submit to all injury to his property without pay, if, as a part of the ordinance and the delivery of Waverly place to the railway company, the building of the viaduct was unconditionally secured and an appropriation for the beginning of the work made; but that this had not been done; that the ordinance in its present shape did not, in his opinion, insure the erection of the viaduct; and that he therefore intended to stand upon his legal rights. The defendants introduced a resolution presented to council for passage by one of its members, providing that the sum of \$20,000, to be taken from the tax fund, should be appropriated for the purpose of beginning the construction of the Washington street viaduct. What action was taken by council upon this resolution did not appear. Such are the facts upon which the defendants rely as creating an estoppel against Coker. If what he did influenced council in adopting the invalid ordinance of which he complains, it is strange that this should be so. Granting that such is the case, however, no one has as yet been hurt by what he did. The doctrine of equitable estoppel must have a subject-matter to work upon. In due time Coker repented of his folly, if, indeed, he committed any. He brings to the attention of the court the attempted commission of a public wrong and the unjustifiable usurpation of a power which has never been conferred upon the city council. In no sense can it be said that Coker

is in *pari delicto* with the defendants, and for that reason is not a person to whom the court can becomingly grant the relief for which he prays.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

TARVER v. THE STATE.

1. The constitution of Georgia requires that all criminal cases shall be tried in the county where the crime was committed. The residence of the defendant is wholly immaterial to the fixing of the venue. Although the form of the indictment prescribed in the Penal Code, § 929, contains an averment of residence of the defendant, the omission of such averment in an indictment will not be ground for quashing the indictment, where it conforms in all other particulars with the prescribed form, and the offense is plainly described in the language of the statute.
2. An assignment of error not referred to in the brief of the plaintiff in error will be treated as abandoned.

Argued June 20, — Decided July 17, 1905. Rehearing denied August 1, 1905.

Indictment for wife-beating. Before Judge Littlejohn. Webster superior court. April 6, 1905.

The plaintiff in error, Dick Tarver, was indicted for the offense of beating his wife. The indictment did not allege the place of his residence, and it was specially demurred to on this ground. The demurrer was overruled, the case proceeded to trial, and a verdict of guilty was returned by the jury. The accused excepts to the overruling of his demurrer, and also complains in his bill of exceptions that he was not furnished an opportunity to plead and was not arraigned, nor did he waive arraignment. It appears that when both sides announced ready for trial, the solicitor-general asked counsel for the accused "if he would sign the waiver, and he replied he would." The trial then proceeded without objection, and the attention of the court was not called to the fact that the waiver was not signed in accordance with the agreement.

Payton & Hay, for plaintiff in error.

F. A. Hooper, solicitor-general, contra.

EVANS, J. 1. Under the early common law, no addition to the name of the person was required in indictments against per-

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sons under the degree of a knight. By the statute of additions (1 Hen. V, c. 5), in all cases in which the exigent was awarded, defendants were described in the indictment by adding to their names "their estate or degree or mystery, and of the towns, or hamlets, or places and counties of which they were or be, or in which they be or were conversant." This statute was applicable only in those cases in which the exigent was awarded. "The exigent was the first process in outlawry, to be issued when the defendant was not found, or did not give himself up; and upon it certain forfeitures, as well as outlawry, followed. Hence the English courts held the addition to be unnecessary where the 'process of outlawry lieth not against' the defendant." 1 Bish. Crim. Proc. § 673. As outlawry and forfeiture never prevailed in this State, it was unnecessary to describe the defendant in the indictment by the addition to his name of his place of residence. The form of indictment prescribed in the Penal Code, § 929, contains an averment of the addition, to the defendant's name, of his place of residence. In *Studstill's case*, 7 Ga. 15, it was said: "The constitution of the State of Georgia requires that all crimes should be prosecuted in the county where they are committed. The residence of the defendant is wholly immaterial as to fixing the venue. It need not be charged that he live in any particular county. It is sufficient if the offense is stated to have been committed in the county where it is prosecuted. It is this which gives jurisdiction to the court." It is true that this question was not raised by demurrer to the indictment, but on a motion to direct a verdict of not guilty. However, the point was directly made in the bill of exceptions, and no question was raised that the objection to the indictment could not be urged in the manner in which it was, and the ruling of the court was authoritative that the averment of the defendant's residence in an indictment was unnecessary. The principle in the *Studstill* case, *supra*, was applied in *Loyd v. State*, 45 Ga. 57. In that case there were two counts in the indictment. The first began and concluded in the statutory form. The second count omitted the introductory words, "And the jurors aforesaid, in the name and behalf of the citizens of Georgia," which appeared in the first count. This court held the indictment good, and that the statutory form need not be followed to the letter, if it be con-

formed to in all material particulars. In *Stevens v. State*, 76 Ga. 96, the indictment was headed, "Georgia, Liberty County," and proceeded, "The grand jurors, selected, chosen, and sworn for the county of —, to wit:" (naming them and proceeding as usual); and the indictment was held good notwithstanding the blank in the form had not been filled by the insertion of the name of the county. The heading was deemed sufficient to show for what county the grand jurors were drawn and served and of what county they were.

There can be no doubt of the authority of the legislature, when not curtailed by constitutional constraint, to prescribe forms of pleading. When so prescribed the forms should be given a liberal and not a literal intendment. *Loyd v. State*, supra. Judicial construction will not eliminate any part of the legislative formula, but rather make it effective by ignoring verbal superfluities and vanities in determining whether there has been a substantial compliance with the statute. The addition of the words, after the defendant's name, "of the county and State aforesaid," as has already been pointed out, was necessary only in certain cases by the statute of additions. By its own terms it was not applicable to our institutions, where outlawry and forfeiture of estates are unknown, and formed no part of the common law at the time of our adopting statute. The incorporation, in the statutory form of indictment, of the defendant's residence may have been due to inadvertence. All that it can amount to is a description of the person of the defendant. If the defendant is sufficiently identified by name, the addition of his residence would be mere surplusage. It is insisted that the conclusion we have reached is not in harmony with the later case of *Hardin v. State*, 106 Ga. 385. If there is a clash between the case just cited and the earlier decisions, then the later case must yield to the older decisions. In *Hardin's* case the indictment entirely omitted the words, prescribed by the statute, "contrary to the laws of said State, the good order, peace, and dignity thereof." The indictment did not contain any words of similar import; and it was held that the indictment should have been quashed on demurrer. The general doctrine of the common law was that the indictment must conclude "contra pacem," etc. 2 Hawk. P. C. c. 25, § 92. Whatever may have been the reason for declaring the act con-

stituting the crime was "against the peace of our said lord the King, his crown and dignity," these or similar words were considered by the English courts essential to the form of an indictment. Our statute requires that, after alleging the offense, the indictment shall conclude with the words, "contrary to the laws of said State," etc. So much of the form as contained these words was declaratory of the common law at the time of the enactment of the statute, and they were given their common-law significance in the case cited. In construing a statute, the common-law construction should be considered; for the legislature will not be presumed to have made any further innovation upon the common law than the case required. *Persons v. Hight*, 4 Ga. 493; 1 Kent's Com. 463. Giving the common-law construction to the addition to the defendant's name of his residence and to the necessity of concluding an indictment "contra pacem," etc., there would seem to be no conflict in the line of decisions to which we have referred.

2. The other assignment of error in the bill of exceptions was not referred to in the brief of the plaintiff in error, and will be treated as abandoned. *Williams v. State*, 121 Ga. 169.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

BROWN v. CITY OF ATLANTA.

1. A sentence imposing two penalties in the alternative, one of which is unauthorized, is not void, but may be enforced as to the penalty which is authorized. *Taff v. State*, 29 Conn. 82; *Lowery v. Hogue*, 85 Cal. 601; *People v. Harrington*, 75 Mich. 112; *In re Sweatman*, 1 Cow. 144, 149.
2. A person upon whom such an alternative sentence has been imposed, and who voluntarily complies with that portion of the sentence which is legal, can not thereafter have the judgment of conviction reviewed.
3. A certiorari sued out by such a person should be dismissed, and a judgment overruling the certiorari and dismissing the petition will not be disturbed.
4. Even if the recorder could not properly state, in his answer to the certiorari, that the fine had been paid, a statement therein to this effect could be acted on by the superior court, in the absence of a traverse of the answer or a denial of the fact therein stated.

Argued June 19, — Decided July 17, 1905.

Certiorari. Before Judge Pendleton. Fulton superior court.
April 25, 1905.

Brown was convicted, in the municipal court of the City of Atlanta, for a violation of an ordinance against the keeping of intoxicating liquors for unlawful sale. The ordinance in question provided that upon conviction the offender should be punished "by a fine not exceeding five hundred dollars, or imprisonment not exceeding thirty days, either or both, in the discretion of the court." The recorder imposed upon the accused a sentence that he pay a fine of one hundred dollars, and costs, and that in default of such payment said defendant work on the streets or public works of said city thirty days under the direction of superintendent of public works." The accused sued out a petition for certiorari, in which he alleged, among other things, that the imposition of the alternative sentence to labor upon the public works was without authority of law. The writ of certiorari was issued, and the recorder answered that the imposition of the alternative penalty complained of was due to inadvertence; that the accused paid the fine imposed before being put to labor on the public works; and that the respondent had no notice of the error in the sentence until the certiorari was served upon him. The judge of the superior court overruled the certiorari, and the accused excepted.

John F. Methvin and *Spencer R. Atkinson*, for plaintiff in error. *James L. Mayson* and *William P. Hill*, contra.

COBB, J. It is contended by counsel for the city that under the charter of Atlanta the sentence of the recorder was legal in its entirety. But this question is immaterial. The recorder undoubtedly had authority to impose a fine. The sentence has been complied with, the penalty which it was lawful to impose has been paid, the judgment is satisfied. The city is not seeking to enforce any other part of the sentence; neither can it do so, whether the alternative penalty which was not submitted to be legal or illegal. It would perhaps have been the better practice for the judge of the superior court to have stricken the petition for certiorari from the files, but the order overruling the certiorari and dismissing the petition, which accomplishes the same result, will not be disturbed. It is contended, however, that the fact as to the payment of the fine was no proper part of the answer of the recorder, and should not have been considered by the superior court; and that this court

ought to inquire into the merits of the case without reference to this question. The writ of certiorari directs the respondent to "certify and send up all the proceedings in said cause to the superior court." Civil Code, §4637. It would seem from this that all papers and records which are material in the determination of the questions raised by the petition for certiorari should be sent up to the superior court with the answer of the respondent. It was doubtless matter of record in the recorder's court that the fine imposed upon the accused had been paid, and the recorder might very properly have sent up a copy of such record. It makes little difference that instead of doing this he simply stated in his answer the fact of the payment of the fine. At any rate, there was no traverse of or motion to strike that part of the answer, nor was there any denial of the fact therein stated. The matter might have been brought to the attention of the superior court by affidavit, or in any other proper way, just as the fact is brought to the attention of the Supreme Court that an act which is sought to be enjoined has been committed, in which case the court declines to pass upon the refusal to grant the injunction. *Randolph v. Bruns. R. Co.*, 120 Ga. 970, and cit. If the fact stated by the recorder was true, the accused had no case to be reviewed; and if it was not true, it was incumbent upon him to deny the statement, and have the question determined in the superior court. Not having done this, the statement will be treated as true, and this court will decline to pass upon the merits of the case. The judge of the superior court reached the right result.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., not presiding.

ALLEN v. THE STATE. EDMUNDS v. THE STATE.

CANDLER, J. 1. A demurrer to an indictment, on the ground that "said indictment shows upon its face interlineations, alterations, substitutions, and changes from the form in which it was originally drawn," is not good, there being nothing to indicate that the alterations were made subsequently to the time the indictment was acted upon by the grand jury. *Jones v. State*, 99 Ga. 46; *Cook v. State*, 119 Ga. 110.

2. An indictment for a violation of the Penal Code, §511, prohibiting throwing rocks or shooting at or in railroad or street cars, need not allege that

the car at which it is charged that the accused threw or shot belonged to a chartered railroad company.

3. The indictments in the cases of *Sanders v. State*, 118 Ga. 788, and *Kiser v. State*, 89 Ga. 421, were based on Penal Code, § 520, and are therefore distinguishable from the case at bar.
4. The evidence was largely circumstantial, but that introduced by the State was sufficient to warrant the conviction of the accused; and it was not error to overrule the certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Certiorari. Before Judge Lewis. Wilkinson superior court. April 5, 1905.

Henry Bunn Wimberly, for plaintiffs in error.

Joseph E. Pottle, solicitor-general, contra.

ALLAMS v. THE STATE.

- FISH, P. J.** 1. Where the accused, on trial for murder, relied on the defense of insanity at the time of the homicide, it was not error to instruct the jury that the burden was upon him to show "that at the time of the killing he was not of sound memory and discretion. He must show this, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury, by a preponderance of the evidence." *Beck v. State*, 76 Ga. 452 (7); *Keener v. State*, 97 Ga. 388 (3); *Minder v. State*, 113 Ga. 772 (3).
2. Nor was it error, on the trial of such a case, to charge the jury that if the accused had been shown to be insane prior to the date of the homicide, the presumption would be that he continued to be insane, "and the burden of proof would be upon the State to show to the reasonable satisfaction of the jury, by a preponderance of the evidence, that at the time of the alleged homicide the defendant was of sound memory and discretion." *Danforth v. State*, 75 Ga. 614 (4).
3. "The rule of law in force in this State, which relieves one from criminal responsibility for the commission of an unlawful act on account of mental disease, is: If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule is, where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, his will is overmastered, and there is no criminal intent; provided, that the act itself is connected with the peculiar delusion under which the prisoner is laboring." *Taylor v. State*, 105 Ga. 746 (1). It follows, therefore, that it was not accurate to charge as follows: "The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong as to the particular act in question, and of being mentally incapable of choosing to do or not to do the alleged act, and governing his conduct in accordance therewith." To relieve one

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from criminal responsibility on account of mental delusion for the commission of an unlawful act, it is not necessary that he be incapable of distinguishing right from wrong as to the particular act in question, and also incapable of choosing to do or not to do such act and of governing his conduct in accordance therewith. The charge referred to in *Quattlebaum v. State*, 119 Ga. 433 (1), was not approved as a correct statement of the law; but it was held merely that the charge there given furnished the accused no cause of complaint, as it placed a greater burden on the State than the law authorizes. The inaccuracy of the charge last above quoted was not cause for a new trial, however, when the court subsequently fully, clearly, and correctly instructed the jury on the law of insanity as an excuse for crime, and specifically applied the correct rule on the subject to the contentions of the accused.

4. The evidence fully warranted the verdict, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Indictment for murder. Before Judge Freeman. Coweta superior court. April 10, 1905.

L. M. Farmer, W. H. Daniel, R. O. Jones, Robert Orr, and J. L. Jones, for plaintiff in error. *John C. Hart, attorney-general, and J. R. Terrell, solicitor-general*, contra.

NANCE v. THE STATE.

CANDLER, J. There is no complaint that the trial judge committed any error of law. The evidence for the State was sufficient to warrant the conviction of the accused on the charge of seduction, and it was not error to overrule the motion for a new trial, the only grounds of which were that the verdict was contrary to law and the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Indictment for seduction. Before Judge Fife. Gordon superior court. April 15, 1905.

Starr & Erwin and George G. Glenn, for plaintiff in error. *Samuel P. Maddox, solicitor-general*, contra.

BOAZ v. THE STATE.

LUMPKIN, J. The evidence being sufficient to support the verdict, and there being no error of law complained of, this court will not interfere with the discretion of the court below in refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Indictment for gaming. Before Judge Fite. Gordon superior court. April 8, 1905.

Starr & Erwin, for plaintiff in error.

Samuel P. Maddox, solicitor-general, contra.

BROWN v. THE STATE.

FISH, P. J. 1. Failure to establish the venue may be taken advantage of under a general assignment of error that the verdict is contrary to law and the evidence, though no question on that subject was raised before the trial court. *Tipton v. State*, 119 Ga. 304.

2. The record fails to show that the venue was proved, and therefore it was error to overrule the certiorari.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Certiorari. Before Judge Spence. Worth superior court. April 25, 1905.

Payton & Hay, for plaintiff in error.

W. E. Wooten, solicitor-general, and *J. H. Tipton*, contra.

DAVIS v. THE STATE.

COBB, J. 1. Evidence that the accused, with ten or twelve others, was seen at night sitting around a box in a house, that some of these persons were engaged in playing cards, that the accused had cards in his hand, that when discovered they all ran, and that afterwards money was found on the box, was sufficient to convict the accused for gaming. *Harmon v. State*, 120 Ga. 197; *Frost v. State*, 120 Ga. 311.

2. The instructions with reference to circumstantial evidence and the rules to be applied in cases of conflict in the testimony were correct. If any fuller instructions as to these matters were desired, written requests should have been made therefor.

3. There was no error requiring the grant of a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Accusation of gaming. Before Judge Spence. Worth superior court. April 25, 1905.

Payton & Hay, for plaintiff in error.

W. E. Wooten, solicitor-general, and *J. H. Tipton*, contra.

WHITE v. THE STATE.

123 503
124 502

- LUMPKIN, J. 1. When this case was formerly before this court the writ of error was dismissed on the ground that no direct writ of error would lie to review a judgment of the city court of Sylvester. *White v. State*, 121 Ga. 592.
2. Where it was sought by a direct bill of exceptions to bring to this court for review a judgment of a local court, and where there was no authority of law for such proceeding, and the writ of error was dismissed in this court for that reason, it was too late to apply to the superior court of the circuit for a writ of certiorari for the purpose of reviewing the judgment, more than thirty days having elapsed from its date to the date of the application.
3. The case of *Roach v. Suller*, 54 Ga. 458, arose in the city court of Savannah, from which a case may properly be brought to this court by writ of error. The writ was not a nullity as in the case at bar, but was dismissed because of irregularities.
4. The application for the writ of certiorari having been made too late, the judgment of the superior court overruling it must be affirmed.
- Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.*

Argued June 19 — Decided July 17, 1905.

Certiorari. Before Judge Spence. Worth superior court. April 25, 1905.

Payton & Hay, for plaintiff in error.

W. E. Wooten, solicitor-general, and *J. H. Tipton*, contra.

LITTLE v. MAYOR AND COUNCIL OF FORT VALLEY.

123 503
Case 2
125 1
125 238
125 239

- FISH, P. J. 1. "Points made in a petition for certiorari not verified by the answer of the trial judge present nothing for determination either by the superior or the Supreme Court." *Fitts v. Atlanta*, 121 Ga. 567.
2. One arraigned in a municipal court for the violation of an ordinance of the municipality is not entitled to a trial by jury. *Littlejohn v. Stells*, 123 Ga. 427.
3. The charge of "keeping intoxicants for sale within the limits of Fort Valley, Ga.," in violation of an ordinance of that town, does not charge the commission of a crime punishable under the laws of the State.
4. The charter of the town of Fort Valley (Acts 1882-3, p. 480) empowers the

mayor to impose a fine not to exceed fifty dollars for a violation of an ordinance of that town.

5. The evidence warranted a finding by the mayor that the accused was guilty of violating the ordinance as charged, and the judge of the superior court did not err in overruling the certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19,—Decided July 17, 1905.

Certiorari. Before Judge Felton. Houston superior court.
May 1, 1905.

John R. Cooper and Wilfred C. Lane, for plaintiff in error.
Louis L. Brown, contra.

MOSES v. THE STATE.

COBB, J. 1. "No question as to the legal sufficiency of an indictment can be properly raised in a motion for a new trial." *Womble v. State*, 107 Ga. 686; *Boswell v. State*, 114 Ga. 40.

2. The evidence warranted the verdict, and there was no abuse of discretion in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19,—Decided July 17, 1905.

Indictment for larceny. Before Judge Mitchell. Berrien superior court. April 10, 1905.

Watts & J. W. Powell and J. H. Hull, for plaintiff in error.
W. E. Thomas, solicitor-general, contra.

GEORGE v. THE STATE.

CANDLER, J. 1. This court will not consider, in lieu of a brief of the evidence, a transcript of the stenographer's notes of the testimony taken on the trial of a case, consisting of questions asked by counsel and the answers given by the witnesses, and not approved by the trial judge. No agreement of counsel can avail to bring such a document to the attention of this court, for the law is imperative that there must be a brief of the evidence, approved by the judge and made a part of the record. Civil Code, § 5529.

2. The indictment charged the accused with the offense of arson, for that on a named day he did "set fire to the mill and machinery building, in the city of Tifton, of the Tifton Knitting Mills, same being a house." There was no demurrer to the indictment. *Held*, that it was not error to allow the State to prove that the Tifton Knitting Mills was a corporation.

3. There being no approved brief of evidence in the record, other questions made by the motion for new trial can not be decided.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Indictment for arson. Before Judge Mitchell. Berrien superior court. April 11, 1905.

J. Z. Jackson and J. W. Powell, for plaintiff in error.

W. E. Thomas, solicitor-general, contra.

BRIGMAN v. THE STATE.

LUMPKIN, J. 1. A ground of a motion for a new trial, complaining of the admission of evidence, which does not show that any objection thereto was made at the time of its admission, or what such objection was, is without merit. It is not enough to show that ground of objection existed at the time of the making of the motion.

2. The verdict was supported by the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Indictment for public indecency. Before Judge Parker. Applying superior court. April 6, 1905.

W. W. Bennett, for plaintiff in error.

John W. Bennett, solicitor-general, contra.

ROBERTS v. THE STATE.

FISH, P. J. 1. On the trial of one charged with using profane language, without provocation, in the presence of a female, it was not error for the court to instruct the jury that if the profane language "was used in her hearing that would be in her presence" (*Brady v. State*, 48 Ga. 311), especially when the court in the same connection and as part of the same sentence charged that "the burden is upon the State to show you that the defendant knew that [the female] was present, or else that the circumstances were sufficient to show that he must have known that she was present."

2. The evidence authorized the verdict, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Indictment for profane language. Before Judge Kimsey.
Dawson superior court. May 6, 1905.

W. B. Sloan, for plaintiff in error.

W. A. Charters, solicitor-general, contra.

McEVOY v. THE STATE.

Cobb, J. 1. "Unless there be great superiority in physical strength of an assailant who strikes another a blow with his fist, or ill health in the assailed at the time, or other circumstances producing relatively great inequality between them in combat, the assailed can not justifiably resent the blow by stabbing the assailant." *Morgan v. State*, 119 Ga. 566 (3), and cit.

2. Considered as a whole, the charge was as favorable to the accused as he had any right, under the facts of the case, to demand. The evidence fully warranted, even if it did not demand, the verdict; and no reason appears for reversing the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Conviction of stabbing. Before Judge Cann. Chatham superior court. April 5, 1905.

Robert L. Colding, for plaintiff in error.

W. W. Osborne, solicitor-general, and *D. J. Charlton*, contra.

OGLESBY v. THE STATE.

Fish, P. J. 1. An accusation framed under the act of August 15, 1903 (Acts 1903, p. 90), and charging that the accused fraudulently procured from the prosecutor "the sum of forty & 57/100 dollars, or the value thereof," was subject to special demurrer on the ground that it did not "set out what property or other thing of value defendant procured," and was "too vague and indefinite to specifically inform defendant of the nature of the offense" charged. See *Henderson v. State*, 113 Ga. 1148.

2. Such accusation being fatally defective, and the trial court having erred in overruling the special demurrer thereto, the Supreme Court will not, in such a case, pass on the constitutionality of the act of the General Assembly upon which the accusation was based. See *Armstrong v. Jones*, 34 Ga. 309 (3).

Judgment reversed. All the Justices concur, except Simmons, C. J. absent.

Argued June 19, — Decided July 17, 1905.

123 506/
Case 2
124 217
124 447

Accusation of misdemeanor. Before Judge Proffitt. Elbert superior court. May 10, 1905.

William D. Tutt Jr., for plaintiff in error.

Thomas J. Brown, solicitor, contra.

WATTS v. MAYOR AND COUNCIL OF FORSYTH.

COBB, J. Evidence that two jugs containing six or seven gallons of intoxicating liquor were found in the house of the accused, in a "dry" county, that she also had fifteen or twenty empty jugs, which apparently had contained whisky, concealed in her house, that the accused admitted that the whisky in the jugs was hers, that certain parties stole a jug of whisky from the house of the accused during her absence, and that nineteen persons at different times had given the accused sums of money ranging from fifty cents to two dollars, "to order" whisky for them, was sufficient to authorize a finding that the accused had violated a municipal ordinance prohibiting the keeping of intoxicating liquors for the purpose of unlawful sale. See *Tucker v. Moultrie*, 122 Ga. 160.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Certiorari. Before Judge Reagan. Monroe superior court. May 8, 1905.

Persons & Persons, for plaintiff in error.

Cabaniss & Willingham, contra.

MAYS v. THE STATE.

CANDLER, J. Under repeated rulings of this court, in order to constitute the crime of abandonment as defined in the Penal Code, § 114, it is necessary that the child shall be not only deserted but left in a destitute condition. If, notwithstanding the desertion, the wants of the child be provided for by others, the statutory crime of abandonment is not made out. *McDaniel v. Campbell*, 78 Ga. 188; *Jemmerson v. State*, 80 Ga. 111; *Crow v. State*, 96 Ga. 297; *Dalton v. State*, 118 Ga. 196.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided July 17, 1905.

Accusation of abandoning child. Before Judge Clark. City court of Forsyth. May 4, 1905.

Persons & Persons, for plaintiff in error.

H. E. Chambliss, solicitor, contra.

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Case 2	
126	637

RAHILLY v. THE STATE.

LUMPKIN, J. The verdict of guilty in this case was supported by the evidence, and, having been approved by the presiding judge, it will not be set aside by this court.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided July 17, 1905.

Indictment for assault with intent to murder. Before Judge Cann. Chatham superior court. April 22, 1905.

Robert L. Colding, for plaintiff in error.

William W. Osborne, solicitor-general, contra.

TURNER v. THE STATE.

EVANS, J. No complaint being made that any error of law was committed on the trial, and the evidence relied on by the State for a conviction being sufficient to sustain the finding of guilty returned by the jury, this court will not undertake to control the exercise by the presiding judge of his discretion in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 10, — Decided July 17, 1905.

Indictment for murder. Before Judge Holden. Hart superior court. June 7, 1905.

W. L. Hodges and *A. A. McCurry*, for plaintiff in error.

John C. Hart, attorney-general, and *David W. Meadows*, solicitor-general, contra.

BASHINSKI v. THE STATE (two cases).

1. The Penal Code, §398 (making penal the keeping of a gaming-house or renting a house to be used for gaming) defines a single offense, which may be committed in any one of the three ways therein designated. Therefore an indictment containing two counts, one charging the defendant with maintaining a gaming-house, and the other with knowingly renting the house with the view and expectation of the same being used for gaming, is not open to demurrer on the ground of misjoinder of separate and distinct offenses. Nor was the second count defective because the name of the tenant was not averred.
2. The verdict against the special plea in bar is not reviewable by direct exception, assigning error that it is contrary to law and the evidence.
3. Where guilty knowledge is the gist of the offense, anything going to show

123 508
Case 3
124 818

the existence of such knowledge is admissible in evidence, and it is immaterial when and from what source such knowledge was acquired.

4. Evidence of a prior conviction of a similar offense, or of the pendency of an indictment charging a like offense, offered by the State, is incompetent to prove the charge made in the indictment under which the defendant is being tried. Such evidence is hurtful as giving the jury an opportunity to infer that the accused is a persistent violator of the law against gaming, and is in all likelihood guilty of the specific charge then brought against him.
5. Testimony that the defendant was lessee of the premises during the period within which it was alleged gaming was carried on in the house was admissible as showing he had control over the premises.
6. If the defendant did not rent the premises for an illegal or immoral purpose, he was under no obligation to use ordinary diligence in discovering the use to which the premises were put; but if the circumstances of the conduct of that business were such as to put him upon notice that the premises were used for gaming, the jury would be authorized to find that the defendant had knowledge that the premises were so used.

Submitted July 10, — Decided July 17, 1905.

Indictment for renting room for gaming. Before Judge Hodges. City court of Macon, June 13, 1905.

John R. Cooper and *M. G. Bayne*, for plaintiff in error.

William Brunson, solicitor-general, contra.

EVANS, J. The indictment against the defendant contained two counts, the first charging him with keeping and maintaining a gaming-house where persons were permitted, with his knowledge, to come together and play for money and other things of value, and the second charging that he "did knowingly rent and let a house and room with the view and expectation of the same being used as a gaming-house and gaming-room." To this indictment the defendant demurred on the grounds, that the second count did not specify the name of the tenant to whom the premises were rented; and that there was a misjoinder of offenses, and the court should require the State to elect upon which count it would proceed. The demurrer was overruled. The defendant then filed a plea of former conviction. This plea was traversed by the State, and the issue was submitted to a jury, who found in favor of the traverse and against the plea. Thereupon the defendant sued out a bill of exceptions complaining of the overruling of his demurrer, and that the verdict of the jury was contrary to law and without evidence to support it. Afterwards, at the same term, the defendant was put upon trial, and convicted. He made a motion for a new trial, which was overruled, and he

sued out a second bill of exceptions, therein complaining of the refusal to grant a new trial upon the various grounds set out in his motion. The cases were argued together before this court.

1. There is no merit in any of the grounds of the demurrer. The charge in the indictment was stated in the language of the statute. Penal Code, § 398. It is not necessary, in an indictment for knowingly renting a house with a view and expectation of the same being used as a gaming-house, that the name of the tenant should be averred. 9 Enc. Pl. & Pr. 775. Neither was there a misjoinder of offenses. The offense of keeping a gaming-house, as defined in the section of the Penal Code above cited, may be committed in any one of the three ways therein designated. The purpose of the statute was to make penal the maintenance of a gaming-house, whether it was conducted directly by the owner or by his servant or agent, or whether he permitted persons to come together at his house and play for money or other thing of value, or knowingly rented a house with the view and expectation that it should be used for that purpose. Thus it has been held that upon an indictment for keeping a gaming-house, and also for renting a house to be used for gaming, a general verdict of guilty is sufficient. *Dohme v. State*, 68 Ga. 339.

2. Where an issue of fact has been tried by a jury and a verdict returned, and the losing party desires to have the correctness of the verdict reviewed by this court, a motion for a new trial is indispensable. *Holsey v. Porter*, 105 Ga. 837; *Bacon v. Jones*, 117 Ga. 497. There was no motion for a new trial complaining of the finding of the jury upon the issue formed by the traverse to the plea of autrefois convict, but the verdict is attacked by direct bill of exceptions. This being true, we can not undertake to pass upon the correctness of that verdict.

3. During the course of the trial on the indictment, the court admitted the testimony of a witness that two of the persons who frequented the place where gaming was conducted, one of whom the State contended was the tenant of the defendant, were professional gamblers and had been for ten years. This evidence was objected to, because, at a prior term of the court, the defendant had been convicted of the offense of keeping and maintaining a gaming-house by renting the house to one of these persons who the witness testified were professional gamblers. The defendant

urged the further objection that the reputation of these persons at a period extending beyond the statute of limitations was irrelevant. The gist of the offense of knowingly renting a house for the practice of gaming is knowledge on the part of the landlord that the house is to be used for that purpose. Knowledge may be proved by circumstances. As was said in *Bashinski v. State*, 122 Ga. 164, where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible, and it is immaterial when or from what source such knowledge was acquired.

4. The court also allowed in evidence, over the defendant's objection, an indictment against him, charging him with having committed a like offense on November 14, 1904, with a verdict of guilty indorsed thereon, and a presentment against the defendant, charging him with the offense of keeping a gaming-house, in the language of the indictment under which he was being tried, as having been committed on January 1, 1905, upon which latter charge he had not been tried. The objection to this evidence was that it was irrelevant and hurtful to the accused. The presentment could under no circumstances be of any evidentiary value. It amounted to merely an accusation by the grand jury that the defendant was guilty of the offense therein charged. The indictment under which he had previously been convicted was likewise irrelevant, because it was in no sense competent evidence to prove the charge made in the indictment under which the defendant was then being tried. That the admission of this evidence was harmful is manifest. In this improper way the jury were informed that the defendant had been previously convicted of a similar offense and that a charge of having committed a like offense was still pending against him. Thus the jury were given the opportunity to infer that the accused was a persistent violator of the laws against gaming and was in all likelihood guilty of the specific charge then brought against him.

5. Objection was made to the testimony of the owner of the premises, that he had rented the same to the defendant. This testimony was competent to show that the defendant, by virtue of his lease, had control of the premises during the period within which it was alleged the house was conducted as a gaming establishment.

6. Criticism is made upon a charge of the court, to the effect that the defendant would be guilty if he "ought to have known of the character of the room in the exercise of the care of an ordinarily prudent man." It is apparent, from a reading of the entire charge of the court, that the presiding judge intended to instruct the jury that if the circumstances disclosed by the evidence were sufficient to satisfy a man of ordinary intelligence that the rented premises were being put to an illegal use, or at the time he rented the same he had good reason to expect they would be put to such a use, then the jury would be authorized to find that the accused had knowledge of the purpose for which the house was rented from him and was used by his tenant. The instruction complained of, however, is susceptible of the construction that the law imposed upon the defendant the duty of exercising ordinary diligence in ascertaining the character of the business conducted in the house over which he had control. If the defendant did not rent the premises for an illegal or immoral purpose, he was under no obligation to use ordinary diligence in discovering the use to which the premises were put; but if the circumstances of the conduct of that business were such as to put him upon notice that the premises were used for gaming, the jury would be authorized to find that the defendant had knowledge that the premises were so used. *Rivers v. State*, 118 Ga. 42. Upon the next trial of the case the court will doubtless so frame its charge as to leave the jury to determine whether or not, under the circumstances brought to light, the defendant did in point of fact know that the premises rented by him were used as a gaming-house, and that the illegal business therein conducted was with his tacit permission and consent.

Judgment in the one case affirmed; in the other reversed. All the Justices concur, except Simmons, C. J., absent.

ANDERSON *et al.*, commissioners, *v.* NEWTON *et al.*, and
vice versa.

1. A bill of exceptions which sets forth a general complaint of the granting of an injunction will not be dismissed on the ground that it does not contain a legally sufficient assignment of error, if it be practicable for this

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123	512
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court, looking to both the bill of exceptions and the transcript of the record, to ascertain what questions were passed on by the trial judge and what rulings the plaintiff in error seeks to have reviewed.

2. The carrying out of a contract to build a court-house should not be enjoined at the instance of taxpayers on the ground that the county authorities failed to observe the requirements of the Political Code, §345, when it appears that there has been a substantial compliance with its provisions respecting an advertisement for bids, putting the public on notice of the "extent and character of the work to be done and the terms and time for payment."
3. County commissioners have a broad discretion in passing upon the necessity of erecting suitable buildings for county purposes and selecting an appropriate site therefor; and the reviewing power of the judge of the superior court should be exercised with caution, and no interference had unless it be manifest that the county authorities are abusing the discretion with which they are vested, or that the tax which they propose to levy to meet the cost of construction is exorbitant and will therefore impose an unauthorized hardship upon the taxpayer. That he may be also subject to municipal taxation affords no reason for enjoining the collection of a county tax which is not itself exorbitant, inasmuch as the needs of the county are not to be suffered to go unsatisfied because of any independent burden upon the taxpayer which he assumes by becoming a resident of a town or city.
4. Whether the funds with which to meet the expenditure shall be raised by a tax for the current year, or by affording the voters of the county an opportunity to authorize the issuance of bonds at an election duly held for that purpose, is a matter solely for the determination of the county authorities, and their decision as to this matter is not subject to review by the judge of the superior court, who has no power to order an election or to delay action on the part of the commissioners till they refer to the voters of the county the question of the expediency of a bond issue.

Argued June 20, — Decided July 17, 1905.

Injunction. Before Judge Lewis. Morgan superior court.
May 30, 1905.

On March 16, 1905, the commissioners of Morgan county advertised for bids to erect a new court-house for that county, the cost of the same not to exceed \$40,000, including furniture, if built on what was known as the "jail lot," or \$46,000, including furniture, if erected on the present site of the court-house. In the advertisement the general character of the building to be erected, its size, and the materials of which it was to be built were stated, and reference was made to minute plans and specifications of file in the office of the county commissioners, according to which the building was to be erected. The advertisement also provided that the construction of the building should com-

mence on May 22, 1905, and that it should be completed by December 28 of that year, payments for the work and materials to be made to the contractor as the structure reached certain specified stages of completion, the last payment to be made when the building was fully completed and was accepted by the architects and the county commissioners. A further stipulation was that each bidder should deposit with his bid a certified check for \$1,000, payable to the county commissioners, as a guarantee that he would enter into a contract with the county upon the terms of his bid within twenty days after its acceptance, and give a bond with security for the faithful performance of his contract, in double the amount of the contract price of the building; and that, upon his failure to enter into such a contract and give such a bond, the check was to be retained by the county commissioners and forfeited as liquidated damages. On April 20, 1905, the county commissioners awarded the contract to the Winder Lumber Company, its proposal to erect the new court-house on the jail lot for \$39,780, including all furniture called for by the specifications, being the lowest and best bid received. Upon the same day, a written contract providing for the erection of the building was duly executed by the representatives of both contracting parties, but up to May 15, 1905, no bond was furnished by the contractor. On that day John T. Newton and other citizens and taxpayers of Morgan county instituted an equitable proceeding in the superior court of that county, the purpose of which was to restrain the county authorities from proceeding under this contract to build a new court-house. The complainants alleged, among other things, that the advertisement for bids was legally insufficient, being too indefinite in certain particulars to put bidders and the public at large upon notice of the terms and conditions upon which the county commissioners proposed to award a contract for the building of a new court-house; that the present structure, while not commodious, was in perfect repair and was adapted to all immediate needs of the county; that its financial condition was not such as to warrant the expenditure necessary to procure a building of the kind which the commissioners proposed to erect, and to levy a direct tax sufficient to meet this expenditure would be so burdensome and oppressive as to amount to a confiscation of the property of the citizens of the county,

nine tenths of whom were opposed to the levy of a tax for this purpose; that the county commissioners did not in good faith intend to raise the necessary amount by a tax imposed for the current year, but to issue county warrants to the contractor which would represent a "floating indebtedness" against the county, which its authorities could not legally create, but which they proposed to meet by ordering an election to vote on issuing bonds to provide the means of paying off this indebtedness after it was incurred, contrary to the provisions of the constitution; and that in no event should the county commissioners be permitted to give effect to the bid of the Winder Lumber Company, it not being in accord with the terms of the advertisement nor advantageous to the county, and that company having forfeited its deposit of \$1,000 by failing to enter into a written contract and give the required bond within the time limited, which forfeiture the county commissioners ought not to be allowed to waive. The complainants prayed that the county commissioners be enjoined from proceeding to build the proposed new court-house till "bids shall be made and accepted after proper notice and advertisement, and until a vote for the issue of bonds to build said court-house shall have lawfully been held;" and that, "in the supervisory powers of the court, the levy of a direct present tax this year to pay for said court-house be enjoined as unnecessary and exorbitant, at least till said bond election shall have been held."

The Winder Lumber Company, which was made a party defendant, filed an answer in which it offered the following explanation of its failure to furnish a bond within twenty days after the contract was awarded: Immediately after its bid was accepted on April 20, its manager, J. B. Williams, was approached by the local agents of a guaranty company, who solicited the privilege of furnishing the bond, but for some reason failed to furnish him with the application therefor till April 26, when he at once signed and returned it to them. On May 10, they notified him that their company could not write the bond; whereupon he promptly took steps to have a bond written by another company, which executed the required bond on May 16, and the same was mailed to the board of county commissioners on May 18, being received by the board three or four days before work was to be commenced on the building, and being still retained by

the board. Williams was induced to procure this bond by the assurance of the chairman of the board that the bond would be accepted if tendered before the 22d of May, the day when work was to begin. The defendant company also alleged that it was ready and willing to comply with its contract, if permitted to do so; but stated very frankly that it was perfectly indifferent as to whether it was allowed to build the court-house, the delay caused by the litigation having already damaged the company and worked a hardship upon it. The company prayed that the court decree that there had been no forfeiture of the deposit of \$1,000, and that the board of county commissioners be required to return the check for that amount, as well as the bond furnished by the company, the board not having accepted the bond nor indicated whether or not it proposed to do so. The county commissioners filed an answer, in which they took issue with the complainants as to the necessity of having a new court-house, and wherein they insisted that the steps taken by the board to procure a suitable building were in all respects legal and proper, especially in view of the fact that on January 18, 1905, an election had been held in the county for the purpose of determining whether bonds should be issued to raise the necessary funds with which to build a new court-house, and the requisite number of votes to authorize the issuance of bonds had not been polled. The commissioners further answered, that while it was their intention to issue county warrants in payment for the building as the work thereon progressed, these warrants were all to be paid on or before December 28, 1905, out of funds to be raised by the levy of a tax sufficient to meet these obligations; and that no debt against the county such as is prohibited by the constitution would be created, nor would the tax imposed amount to a confiscation of the property of the citizens, though doubtless the burden upon them would be less were they willing to authorize the issuance of bonds. As to the failure of the contractor to furnish a bond within the time limited in the advertisement for bids, the commissioners replied that it was within their discretion to waive the forfeiture and allow the contractor to comply with the contract, though, owing to the restraining order served upon them, they had not undertaken to pass upon the sufficiency of the bond which had been mailed to them by the contractor before the date upon which

work was to have commenced on the building, nor had they in any way waived any right of the county to insist upon the forfeiture.

At the interlocutory hearing much evidence was introduced, pro and con, as to the expediency of building a new court-house, in view of the condition of the structure then in use and its capacity to serve the present needs of the county. After considering the evidence bearing upon this and other issues involved, the court passed an order reciting that, in the opinion of the presiding judge, "the county commissioners have the right to decide whether a new court-house should be built or not, and have the right to decide where the same should be located," as well as the "right, if it become necessary so to do, to levy a tax this year to pay for the same;" but the court is, "however, of the opinion that no such urgent necessity exists as to justify, under the circumstances of this case, the levy of such a tax before the people have had another opportunity to vote on bonds. While the court sees no irregularity [in] the making of a contract with the Winder Lumber Company which might not be waived, said company consenting in open court to setting the same aside, it is therefore ordered that any further prosecution of the same on the part of the parties thereto be enjoined and restrained, and that the said commissioners be enjoined from longer detaining the \$1,000.00 and the indemnity bond deposited with said contract. It is further ordered that the said commissioners be restrained from entering into any contract to build said court-house, or from levying any tax to pay for the same until they shall have first submitted to the people, as provided by law, the question whether bonds shall be authorized to build said court-house." To the granting of this injunction the county commissioners excepted; and by cross-bill of exceptions the complainants assign error upon the order of the court in so far as it sets forth the decision of the court that it was within the power of the county commissioners to determine the necessity of building a new court-house and to choose the site thereof, as well as to levy a tax to raise the amount necessary to erect the building, and that there was no irregularity in the steps taken in advertising for bids and awarding the contract to the Winder Lumber Company.

George & Anderson, for the county commissioners.

Williford & Middlebrooks, *S. H. Sibley*, and *C. H. Brand*,
contra.

EVANS, J. (After stating the facts.) 1. On the call of the case in this court, a motion was made to dismiss the main bill of exceptions, on the ground that it contained no legally sufficient assignment of error. The plaintiffs in error therein complain, in general terms, that the court erred in holding, (1) that there was no such urgent necessity as justified the levy of a tax before the people had been afforded another opportunity to vote on the issuance of bonds; and (2) for this reason the commissioners should be enjoined from carrying into effect the contract made with the Winder Lumber Company, notwithstanding there was no irregularity connected with that contract which the commissioners were not authorized to waive. While the exceptions to the judgment of the court may not be altogether orthodox, in that no specific reason is assigned why the rulings of the court were erroneous, yet we think they are legally sufficient, tested by the loose practice to which our General Assembly has lent its countenance. The Civil Code, § 5569, declares that this court shall not "dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to [this] court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided." "In other words, an assignment of error will be sufficient if this court, viewing it in the light of the record, can ascertain substantially what questions the trial court passed on, and which are sought to be reviewed here." *Turner v. Alexander*, 112 Ga. 821. In an endeavor to follow this legislative mandate, this court, in *Carter v. Jackson*, 115 Ga. 679, laid down the rule that "A general exception to the judgment, and a specific assignment of error on the special ruling upon which the judgment was based, is sufficient to present for consideration the question whether the court erred in the special ruling complained of, and in entering the general judgment" in accordance with such ruling. In *Atlanta Ry. Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481, the complaint made of the refusal to grant an injunction was that the judgment of the court

was contrary to the law and evidence in the case, without assigning any reason why this was so; and still the assignment of error was deemed sufficient to withstand a motion to dismiss the writ of error. In *Wyatt v. Crowder*, 112 Ga. 168, this court was able to ascertain from the record that the refusal of an injunction was necessarily based upon the opinion entertained by the judge that the petition, taken as true, did not entitle the plaintiffs to the relief prayed for; and this being so, a general complaint that the court erred in denying an injunction was held to be a legally sufficient assignment of error. Likewise, where the direction of a verdict has been characterized as erroneous, without any reason being assigned why the judgment of the court was wrong, we have retained writs of error upon the bare supposition that the plaintiff in error intended to attack the judgment on the ground that, in view of the pleadings and the evidence submitted in support thereof, the court committed an error of law in holding that the party in whose favor the verdict was directed was entitled to prevail. *Phillips v. Railway Co.*, 112 Ga. 197; *Howell v. Pennington*, 118 Ga. 496-7; *Taylor v. McLaughlin*, 120 Ga. 705. In the present case, the pleadings disclose what issues of fact were presented for determination, and the bill of exceptions contains a brief of the evidence offered in support of the contentions of the respective parties. We are thus in a position to determine by what rules of law the presiding judge should have been guided in the exercise of his discretionary powers, and the written order which he passed sets forth his decision upon each of the several questions on which he undertook to pass. The county commissioners acquiesce in the correctness of some of the rulings therein made, but complain that the rulings made on some of the questions passed on were erroneous. We therefore are informed that they have a more or less definite consciousness that the rulings excepted to are wrong, and we are doubtless warranted in assuming that they are attacked on the ground that, in view of the undisputed facts appearing on the trial and the law applicable thereto, the court incorrectly held it was within its province to grant an injunction for the reasons set forth in the order which it passed. Upon this assumption the motion to dismiss the writ of error is overruled; and we will upon this assumption endeavor to deal with what we conceive to be the actual

grounds upon which the parties enjoined complain that their liberty of action in the premises has been interfered with.

2. The court correctly held the advertisement for bids to erect a new court-house was not, for any of the reasons urged by the complainants, too uncertain and indefinite to put bidders and the general public on notice of the terms and conditions upon which the structure was to be built. The advertisement expressly provided that bids were to include the furnishing of furniture for the building, and referred to plans and specifications on file in the office of the board of county commissioners for minute information as to the character of the structure and the kind and quantity of furniture with which it was to be fitted. That bids were invited for the construction of a court-house on a given site not to exceed a stated amount, and also for the erection of the building on a different site at a cost not exceeding another stated amount, did not render the invitation confusing. Separate advertisements asking for separate bids would not better have given notice of the intention of the commissioners to decide whether, after the cost of erecting the building on each of the sites mentioned had been ascertained, the contract would be let to the lowest bidder proposing to erect the court-house on the "jail lot," or to the lowest bidder proposing to erect the structure on the site on which stands the building now used as a court-house. We can not conceive that any bidder who had sufficient intelligence to erect such a building was deterred from bidding simply because he did not understand that the commissioners wished to ascertain, before awarding the contract, what would be the relative cost of erecting the new court-house on the present site as compared with the cost of erecting it on the "jail lot." The times and the terms of payment of the contract price were stated with all necessary particularity; that full payment was to be made within the current year was stated beyond peradventure. County warrants were to be issued as the work progressed from one stage of completion to another, the same to be "due and paid on or before Dec. 28, 1905;" presumably, it was contemplated that these warrants would be paid promptly as issued; certainly there is no suggestion to the contrary, but an express stipulation that they were to be paid "on or before" the date fixed

for the completion of the building. A legal promise of payment is made, and it can not be assumed that the commissioners had no intention of performing this promise. Though there might be no secret of the fact that the county owed certain outstanding indebtedness and had little or no ready funds in its treasury, this circumstance in no way negatived the intention or ability of the commissioners to make the proposed payments; it was at least within their power to pay, for they were vested with authority to raise the necessary funds by the levy of a direct tax. If any one was deterred from bidding because he doubted the fulfillment of the promise to pay, it must have been because he had reason to believe the county would be a debtor he feared to trust, and not because the advertisement inviting his trust and confidence was itself ambiguous or in any respect defective.

3. Equally clear is it that the court correctly held that the board of county commissioners was vested with discretionary power with respect to deciding whether or not the erection of a new court-house was a present and urgent public necessity, and, if so, upon what site it should be built. The evidence authorized, if it did not demand, the further conclusion that the commissioners were acting within the powers conferred upon them by law, in taking the steps which they pursued in carrying out their intention of providing the county with a suitable court-house by letting out the contract for the erection thereof to the Winder Lumber Company. Indeed the proposed tax was not shown to be a burden which they could not lawfully impose upon the property owners of the county, nor was it shown that the court could properly, for any other reason, interpose and enjoin the carrying out of the project upon the idea that the county authorities were not acting wholly within the scope of the discretionary powers expressly conferred upon them by law. "The discretion vested in the county authorities must be from the nature of the case a broad one; and therefore the reviewing power of the judge of the superior court must be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law." *Commissioners v. Porter Mfg. Co.*, 103 Ga. 617. The levy of an additional tax of two per

cent. or less, when necessary to raise the amount required, can not be considered an exorbitant assessment or unauthorized burden imposed on the taxpayer. *Dyer v. Erwin*, 106 Ga. 845, 849. The fact that he may also be liable to municipal taxation affords no ground for suffering the needs of the county to go unsatisfied; however burdensome municipal taxation may be, the necessity of providing the county with a suitable courthouse should be met, if this can be done by levying a county tax which is not itself exorbitant; the citizen must forego the luxury of city life, if unable to bear its incidental expense and still perform the obligations of a citizen which he owes to the county. The Political Code, § 396, conferring upon the judge of the superior court jurisdiction to review the action of the county authorities, does not contemplate that the extravagances of a municipal corporation shall defeat the power of such authorities to supply the wants of the county..

4. The presiding judge having properly declined to grant an injunction on the ground that the building of the new courthouse was unnecessary, or because the proposed tax was exorbitant, as claimed, it only remains to inquire whether it was within his province to determine the expediency of taking immediate action or postponing action till the people could be afforded another opportunity of voicing their opinion as to the advisability of issuing bonds for the purpose of raising funds with which to erect the contemplated building. The county commissioners had the discretionary power to decide whether the requisite funds should be raised by a tax imposed for the current year, or by the issuance of bonds, provided authority to issue the same could be secured from the voters of the county at an election duly held in accordance with the provisions of the constitution. *Elliott v. Gammon*, 76 Ga. 766. An election had previously been held, at which the people declined to authorize the issuance of bonds; and the commissioners doubtless exercised a wise discretion in determining to no longer delay the matter, but to presently meet the emergency by awarding a contract for the construction of the building and levying a tax to meet the necessary expense. It was not within the power of the court to override their decision as to this matter, even though the judge may have been justified in his conclusion that the necessity of erecting a suitable building

was not so "urgent" as to make improper the delay incident to holding another election. The only question he was called on to decide was whether the necessity existed, and, if so, whether the proposed tax would be exorbitant. The commissioners having determined to exercise their power to levy a tax, the court had no power to order an election, nor any authority to delay action on the part of the commissioners in order that the people might vote on the advisability of issuing bonds.

Judgment on main bill of exceptions reversed; on cross-bill affirmed. All the Justices concur, except Simmons, C. J., absent

JENKINS v. THE STATE.

1. The theory of voluntary manslaughter was presented by one view of the evidence, and the trial judge properly instructed the jury as to the law bearing on that grade of homicide.
2. The argument of the solicitor-general to which objection was made was authorized by the facts proved and such legitimate inferences as might be drawn therefrom.
3. Prejudicial error was committed by the presiding judge, who, on being asked to allow the accused to supplement his statement to the jury, said: "Let him finish his statement; I never knew one of them to get through making his statement." This remark was calculated to impress the jury with the idea that the judge entertained the opinion that what the accused might say in his defense was of little importance. (CANDLER, J., dissents.)
4. The charge of the court as to the law relating to self-defense was sufficiently full and explicit, in the absence of an appropriate request in writing to charge more fully as to what might constitute reasonable fears; and the request presented, not being adjusted to the facts of the case, was rightly withheld from the jury.

Argued May 15, — Decided June 17, 1905. Opinion filed July 31, 1905.

Conviction of manslaughter. Before Judge Lewis. Jasper superior court. March 29, 1905.

Cited, as to matter ruled on in third headnote, *Ga. R.* 12/215; 108/786; 111/832; 114/24, 267; 86/112; 120/797; 101/739; 43/90; 89/161; 117/553, 693; 105/150.

A. Y. Clement and A. S. Thurman, for plaintiff in error.

J. E. Pottle, solicitor-general, contra.

EVANS, J. The plaintiff in error, Clem Jenkins jr., was charged with the murder of Jim Wilson, and was convicted of

123	523
125	304
126	423
126	552

123	523
128	253

voluntary manslaughter. The court declined to grant the accused a new trial, and he excepts to the judgment overruling his motion therefor.

1. Counsel for the accused insists that the evidence did not warrant a finding of voluntary manslaughter, and that the court erred in charging the jury as to the law bearing on that grade of homicide. While there was testimony which would doubtless have warranted a conviction of murder, and the statement of the accused presented the theory of self-defense, there was also testimony from which the jury might well have concluded that the following summary of what occurred really represented the truth of the matter under investigation: On the night of the homicide, while a younger brother of the accused was on his way to church, he was met by the deceased, who gave him a beating. The accused was told by his brother at the church that he had been mistreated and beaten by the deceased. After the services, a number of persons, including the deceased and the accused, left the church and started home along a public road. The accused asked the deceased why he had whipped this younger brother, saying he was a minor, and, if he had done anything to the deceased, the deceased should have told the boy's mother or elder brother. The deceased made some reply to the effect that he was not going to tell anybody anything, and that he had done what he wanted to, and intended to do as he pleased. The accused said he did not want to have any fuss, and it was not worth while for the deceased to "start his big talk." The latter persisted in his offensive braggadocio, and several of those in the crowd endeavored to persuade him to let the accused alone and to go on peaceably to his home. The deceased declined to drop the matter and continued in his effort to provoke the accused into a quarrel. The accused said: "If you have got that baby gun in your pocket, I will make you use it," and the deceased replied; "I will use it, too." He threatened a number of times to kill the accused, and avowed his purpose to do so when they reached a field on the way home. The deceased stopped a few moments at a house upon the roadside, but caught up with the crowd again at a house some distance beyond, where some of those in the party stopped to get water. The accused, who was accompanied by his wife, did not stop at the well,

but proceeded through the yard along a path which led to his home and to that of the deceased. As the deceased came up to the gate, one of the men in the party called on him to wait, intending to take him home by the road, in order to prevent any difficulty, but he went on into the yard. One of the women then took hold of him and told him to leave the accused alone and go on home to his mother. He jerked loose, saying, "Little Buddy thinks I am scared of him; I will kill him." The accused turned and asked: "What is that you say?" The deceased replied, "You think I am scared of you, but I will kill you!" at the same time advancing with one of his hands in his right-hand pants pocket, as though he intended to then and there carry out his threat. They were but fourteen or fifteen steps from each other. The accused immediately drew his pistol and fired, without waiting for the deceased to make any further hostile demonstration. Only one shot was fired; it inflicted upon the deceased the wound which caused his death. He was not, in point of fact, armed with a pistol, as an examination of his person disclosed when his pockets were searched by some of those present after he fell and was lying upon the ground. In the pocket in which he had his hand only a pocket-book was found, and he had no weapon concealed about him, though it was more or less generally known that he was in the habit of carrying a pistol. He was scarcely sixteen years old, but was large for his age and as tall as a man, and appeared to be larger than the accused. The deceased was of a violent and quarrelsome nature; the accused, however, had never before had any personal difficulty with any one, was of a peaceable disposition, and did not display anger on the way home up to the time the party stopped at the scene of the homicide.

If the deceased did not have a pistol or any other weapon, the life of the accused was not in actual peril at the time of the shooting, nor was the deceased close enough to commit any violent assault upon his person. It was for the jury to determine whether the circumstances were such as to excite the fears of a reasonable man, if they believed the statement of the accused and the testimony of one of his witnesses that the deceased was advancing with something "shiny" in the hand which he was attempting to withdraw from his pocket. If the jury did not believe this to be true, then they would have to deal with the ques-

tion whether, the accused having shot under no real or apparent necessity, he acted under a sudden heat of passion, being provoked beyond endurance by the persistent endeavor of the deceased to draw him into a personal difficulty, and believing the deceased to be armed and inviting him to enter into a combat with deadly weapons. The accused had reason to believe the deceased had a pistol; the latter led him to think so, and threatened repeatedly to use one, though he apparently was not wrought up into a frame of mind where he was prepared to shoot in cold blood and wanted to provoke a quarrel as a pretext for resorting to the use of a deadly weapon. To reduce the killing to the grade of voluntary manslaughter, it was not necessary that any actual assault should have been made by the deceased upon the accused. *Stokes v. State*, 18 Ga. 17, 37; *Elliott v. State*, 46 Ga. 163. Where there is a mutual intention to fight, the approach of the deceased in furtherance of his design to do the accused serious injury may be the equivalent of an actual assault upon the latter, so far as reducing the killing to voluntary manslaughter is concerned. *Ray v. State*, 15 Ga. 223. Our statute defining voluntary manslaughter declares that not only an actual assault or attempt to commit a serious personal injury upon the slayer, but also "other equivalent circumstances to justify the excitement of passion," may be sufficient to exclude the idea of a deliberate and wanton intention to take the life of the person killed. Penal Code, § 64. So, as was held in *Ragland's case*, 111 Ga. 211, "Whether an advance by one man armed with a stick on another in the nighttime, and declining to stop when called on to do so, constitute circumstances equivalent to an assault, so as to authorize a homicide to be reduced to voluntary manslaughter, is a question for the jury." True, in the case now before us, the deceased appears not to have been armed with a pistol or other weapon. But the accused had reason to believe to the contrary, and the situation which confronted him is to be viewed, not necessarily in the light of the facts subsequently developed, but as it appeared to him and would have been looked at by a reasonable man placed in his position. *Murray v. State*, 85 Ga. 378. His state of mind, produced by the circumstances as they appeared to him, was a proper subject-matter to be inquired into by the jury. If an unjustifiable homicide resulted from the accept-

ance by him of a challenge to enter into a mutual combat with deadly weapons, the killing was no more than voluntary manslaughter. *Tate v. State*, 46 Ga. 148; *Trice v. State*, 89 Ga. 742. Mutual intention to fight may not only negative the theory of self-defense, but may likewise exclude the idea of malice, if such intention grows out of hot blood produced by provocation other than that induced by mere words, threats, menaces, or contemptuous gestures. If the provocation be produced by an actual assault, by an attempt to commit a serious personal injury upon the slayer, or by "other equivalent circumstances" calculated to excite sudden passion, the fact that the accused shot with the intention to kill would not render the offense that of murder. *Jackson v. State*, 82 Ga. 449. "Bad" blood, which induces a cherished intention to deliberately kill, is not to be confused with "hot" blood, excited by a sudden and unexpected emergency with which the slayer is, through no fault of his own, unfortunately confronted. In *McGuffie's case*, 17 Ga. 514, one theory of the homicide which the evidence presented was that after the accused had, with malicious intent, pointed his gun at the deceased, but had desisted at the instance of bystanders and would not have again pointed the gun at the deceased or have fired upon him, the accused was provoked by the remark of the deceased that he would throw a brickbat at the accused if he raised his gun again; and this court held that if the accused would not have again presented his gun at the deceased, nor have fired at him but for the throwing of the brickbat, the crime may have been no more than voluntary manslaughter. In the case of *Irby v. State*, 32 Ga. 496, a youth but fourteen years of age was put on trial for murder. The evidence disclosed that while his father and another man were engaged in a fist fight, and a bystander was in the act of separating them, the accused suddenly appeared on the scene with a pistol and shot down his father's assailant without any apparent necessity; yet this court, having regard to the sudden passion which may have been aroused in the breast of this youth upon seeing another man attempting to inflict injury upon his father, held that the evidence warranted a verdict of voluntary manslaughter. In the present case we think the verdict of the jury was fully justified. Indeed it apparently speaks the real truth regarding the homicide with the commission of which the accused was charged.

2. The theory of the State was, of course, that the accused was a man who entertained a wanton disregard for human life. The solicitor-general sought to impress this idea upon the jury by arguing before them that the evidence disclosed that the accused "carried that old pistol down there to the church that night," and that he "carried it there with a purpose." Counsel for the accused objected to this argument, on the ground that there was no evidence before the jury which warranted it, and, the solicitor-general insisting that there was, asked that the stenographic report of the testimony be read in order that the dispute might be settled. The court declined to permit this to be done; "said that the jury would determine what was in evidence, and directed the solicitor to proceed with his argument." Exception is taken to the manner in which the court thus disposed of the matter. There was evidence which at least warranted the inference that the accused did carry his pistol with him to the church on the night of the homicide. One of the witnesses for the State testified that while he and the accused were outside the church, looking "after people's stock," the accused said the deceased had whipped his little brother, and he intended to whip the deceased after they left the church, and, if he resisted, would use a pistol which he then and there exhibited to the witness. Presumably, the accused took his pistol with him to the church. In his statement to the jury, he undertook to explain that he had previously loaned his pistol to "a fellow" who was to return it on the night before, but who on the night of the homicide told the accused, if he wanted the pistol, to come by his house for it; and the accused stated that he had not carried the pistol to the church that night. If he meant that he had called by for his pistol on the way home from church, there was nothing to substantiate his statement, but it was in conflict with the testimony of the State's witness as to the accused having the pistol at the church before the services were concluded. If he intended to be understood as saying that he did not leave home with the pistol, but got it from the borrower while on the way to church, it was still for the jury to say what was the truth in this regard, as they were not bound to accept his statement as true. Certainly the argument of the State's counsel was not wholly without foundation established by the evidence, and the ruling of the court excepted to affords no

ground for setting aside the verdict of the jury, especially as it negatives the idea that the argument objected to influenced their finding, which was that the accused acted without preparation, deliberation, or any other indicia of malice towards the deceased.

3. Immediately after the accused had concluded his statement to the jury, he informed his counsel that he had inadvertently omitted to refer to a matter which he wished to explain to the jury—the reason he happened to be armed on the night of the homicide. Counsel asked permission of the court for the accused to make an additional statement. The presiding judge replied: “Let him finish his statement; I never knew one of them to get through making his statement.” Complaint is made that the language used by the judge in granting the privilege asked not only stripped it of all benefit to the accused, but had the effect of creating the impression upon the jury that, in the opinion of his honor, what the accused might say in his defense was entitled to little weight and he had already consumed, to no purpose, much of the valuable time of the court. The remark of the court certainly may have had that tendency. It was discretionary with the judge whether or not he should allow the accused to supplement his statement (*Owens v. State*, 120 Ga. 209; *Johnson v. State*, Id. 509); but, if the indulgence were granted at all, it should have been accorded in terms which would give to the accused the benefit he sought, and not create any unfavorable impression against him. So much importance is attached to the prejudicial influence upon a jury which an unguarded remark by the presiding judge may have upon them, that it is provided by statute (Civil Code, § 4334) that a new trial shall be granted in every case, whether civil or criminal, whenever he shall, during the progress of the trial and in the presence of the jury, either express or intimate his opinion as to what has or has not been proved. The duty of non-committal which this statute imposes upon a presiding judge has been heretofore clearly pointed out. *Hubbard v. State*, 108 Ga. 786; *Varner v. R. Co.*, Id. 813; *Jaques v. State*, 111 Ga. 832; *Alexander v. State*, 114 Ga. 266; *Potter v. State*, 117 Ga. 693. The right of the accused to make to the jury a statement in his defense is one conferred by express statute (Penal Code, § 1010), and that statute declares the jury “may believe it in preference to the sworn testimony in the case.”

To disparage his statement, which the jury could believe in preference to the sworn testimony, is to deprive him of the substantial right of having the jury pass upon it uninfluenced by the expression or intimation of any opinion by the judge that it is entitled to little or no consideration. So, in *Alexander's* case, supra, this court held he was entitled to another trial because of the fact that the trial judge inadvertently, during the course of his charge to the jury, made use of language which was "calculated to impress the jury that they ought to be cautious in giving credit to what" the accused said concerning the alleged offense. In *Smith v. State*, 109 Ga. 479, the accused rested his sole defense, which he sought to establish by his statement and corroborating evidence, upon the theory of accidental homicide; and he was accorded another opportunity of presenting that defense to the jury without the "implied judicial disapproval" which was cast upon it by the remark made by the presiding judge when he merely incidentally referred to this defense before concluding his charge to the jury. In the present case, the sole defense of the accused was that of self-defense, and he relied almost altogether upon his statement for the establishment of the same. The prejudicial remark of the court, though lightly made, may have had undue weight with the jury. Even had the judge instructed the jury to disregard it, "no man could dare say they were not thereby influenced, to some extent at least," and the caution given to the jury not to allow it to affect their verdict could not be regarded as removing its harmful tendency. *Alexander v. State*, 114 Ga. 266. Another opportunity to present his defense is the only way in which one accused of crime may be effectually guarded against the hurtful tendency of such a remark coming from the lips of the judge himself. *Potter v. State*, 117 Ga. 693. And this being true, it is not, as was held in that case, incumbent on the accused to move for a mistrial, as he is reasonably to be expected to do when remarks to his prejudice are made by the State's counsel or others connected with the trial over whom the judge may exercise direction and control. "The law gives to one accused of crime the absolute guarantee of a new trial in the event he is deprived of a fair and impartial trial by reason of the fact that the judge before whom he is convicted commits the grave error which the above-mentioned sec-

tion of our code declares can in no case be overlooked or forgiven. It is not within our province to change the law." Ibid. 698.

4. The charge of the court as to the law relating to self-defense was sufficiently full and explicit, in the absence of an appropriate request in writing to charge more fully as to what might constitute reasonable fears. The request presented was not adjusted to the facts brought to light by the evidence or the prisoner's statement, in that it was based on the theory that he had reason to apprehend that a felony was about to be committed, not only upon his own person, but "on the person of his wife or brother." We accordingly hold there was no error committed in declining to give in charge this request.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Candler, J., who dissents.

EDWARDS v. THE STATE.

CANDLER, J. So far as the record shows, there was an entire failure to prove the venue of the crime with which the accused stood charged; and for this reason the judge of the superior court should have sustained the certiorari.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19,—Decided July 17, 1905. Rehearing denied August 4, 1905.

Accusation of larceny. Before Judge Spence. Worth superior court. April 25, 1905.

Payton & Hay, for plaintiff in error.

W. E. Wooten, solicitor-general, and *J. H. Tipton*, contra.

ON MOTION FOR REHEARING.

CANDLER, J. A motion for rehearing was made by the solicitor-general of the Albany circuit and the solicitor of the city court of Sylvester, the ground of the motion being, in effect, that this court had reached an erroneous conclusion in holding that the venue of the crime charged was not proved, inasmuch as it appeared from exceptions which were filed to the answer of the trial judge, and which were sustained and adopted as a part of the answer, that there was evidence that the goods alleged to have been stolen were taken from a wagon belonging to the prosecutor while he and the accused were journeying together

from Albany, in Dougherty county, to the home of the prosecutor, in Worth county; that the accused also lived in Worth county, near the prosecutor; and that the goods were shortly afterwards found in a trunk in the home of the accused. Of course, if this had appeared in the record before us, it could never have been held that the venue was not shown; for whether the theft took place in Worth county or in Dougherty, if the goods were afterwards taken into Worth county the accused was subject to trial in the latter county. In the record sent to this court, however, there was no suggestion of any exceptions to the answer of the trial judge; the answer incorporated in the record, which practically adopted the allegations of the petition for certiorari, merely showing that the goods stolen were taken from the wagon on the road from Albany to the home of the prosecutor, and that they were afterwards found in the house of the accused, without indicating in any way that either the accused or the prosecutor lived in Worth county. When the case was argued in this court it was not suggested that the transcript sent up did not contain all the record, nor was our attention called to anything which would indicate that we did not have the entire record before us. As a matter of course, we decided the case on the record as it stood. After the filing of the motion to rehear, the attention of the solicitor having been called to the fact that the exceptions to the answer of the judge of the city court did not appear in the record, he caused to be sent to this court, under the seal of the clerk of the superior court of Worth county a paper purporting to be a copy of such exceptions, together with a certificate by the clerk that it was inadvertently omitted from the original transcript sent to this court. This paper completely makes out the case against the accused. An insurmountable obstacle to its consideration, however, is that it has never in any proper or regular way been made a part of the record. It is the duty of counsel to see to it that all material parts of the record are sent to this court in the first instance. If this is not done, they may at any time before the argument of the case suggest a diminution of the record, and have the omitted portions sent up. After judgment, however, it is too late to ask that the case be reopened for the purpose of considering matters which should have been brought to the attention of this court long ago. The motion to rehear is accordingly denied.

WILLIAMS v. THE STATE.

- CANDLER, J. 1. The ground of the motion for a new trial alleging the existence of newly discovered evidence was not insisted upon in this court, and will be treated as having been abandoned.
2. There was no complaint that the court below committed any error of law, but the accused relied upon the contention that the verdict was contrary to law and the evidence and without evidence to support it. While the evidence for the State, as it appears in the record, was in some respects confusing, it was sufficient to support the conviction of the accused. The trial judge approved the verdict, and the judgment refusing a new trial will not be set aside.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 19, — Decided August 1, 1905.

Indictment for larceny. Before Judge Littlejohn. Dooly superior court. April 26, 1905.

Busbee & Busbee and Pearson Ellis, for plaintiff in error.

F. A. Hooper, solicitor-general, contra.

CAMPBELL v. THE STATE.

1. Where letters have been lost or destroyed, their contents, if material, may be proved by a witness who testifies that he read them and knows the substance of them, although he can not state what they contained "word for word."
2. Where a wife has been indicted for the murder of her husband, on the trial it is competent to prove declarations or acts on her part near the time of the alleged homicide, tending to show ill will or malice on her part toward him, or to prove a line of conduct or gross ill treatment and cruelty on her part toward him, continuing until shortly before the alleged offense. Such evidence is admissible for the purpose of showing motive or malice on the part of the accused, and to rebut the presumed improbability of a wife murdering her husband.
3. Immaterial errors which could not have injured the defendant furnish no ground for a new trial.
4. On the trial of a criminal case, although a witness for the State on direct examination testified that he received and saw certain letters written by the defendant, yet where on cross-examination he stated that he did not know that the defendant wrote the letters, or that she authorized any one to write them, or that she was advised of their contents, they should have been excluded from evidence on motion. Nor were they rendered admissible because on redirect examination the witness stated that the name of the defendant appeared to be signed to the letters, and that they referred to her husband, and some of them were directed to him and some to the witness, and that they came by mail from a city where she told him that she intended

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- to go, although he did not know that she was in such city except from the fact that the letters came from that place.
5. The refusal to allow counsel to ask a question of a witness, to the effect that if another witness had testified that a bullet entered the skull of the deceased "on the left about where my finger is," and penetrated to the skull back near the ear, whether the other witness was mistaken, furnished no ground for a new trial. If the form of question was admissible at all, its materiality is not apparent in the absence of any information in the record as to where counsel in fact placed his finger as an indication of locality.
 6. To warrant a conviction on circumstantial evidence alone, the proved facts must not only be consistent with the hypothesis of guilt but must exclude every reasonable hypothesis save that of the guilt of the accused. It is erroneous to charge that the jury would be authorized to find the defendant guilty unless there is some other hypothesis as reasonable as that the defendant committed the act.
 7. In the absence of a request to charge on the subject of weighing the testimony of witnesses in cases of conflict, the omission of the judge to do so will furnish no ground for a new trial.
 8. Where the jury returned into court a verdict of guilty, and while it was being received the foreman asked the presiding judge if the jury could find that the defendant be punished for a less term of years than her lifetime, to which he replied that they could not do so under a verdict of guilty, and the verdict was regularly received and recorded without objection or request that the jury be polled, or that they be required to return to their room for further deliberation, this furnished no ground for a new trial on behalf of the defendant, there being nothing to show that the verdict was not regularly agreed upon by the jury.

Argued June 19, — Decided, August 1, 1905.

Indictment for murder. Before Judge Mitchell. Berrien superior court. May 15, 1905.

Nancy Campbell was indicted for the murder of her husband, Alex. Campbell, charged to have been committed on the 14th day of January, 1905. The evidence introduced on the trial was entirely circumstantial. She was convicted, moved for a new trial, and, after refusal of the motion, excepted.

Hendricks, Smith & Chastain, for plaintiff in error.

John C. Hart, attorney-general, and *W. E. Thomas*, solicitor-general, contra.

LUMPKIN, J. (After stating the foregoing facts.) 1. A witness was allowed to testify in regard to the contents of certain letters. He stated that they were lost or destroyed, and what was the substance of them; but said that he did not know what they contained "word for word." Objection was made to this evidence,

on the ground that the witness was allowed to testify to a part of the contents of the letters when he could not recollect all of them. There is plainly no merit in this objection.

2. Objection was made to permitting a witness to testify that he heard a conversation, "along in the fall," between the defendant and the deceased, tending to show that she was mad with him, and was complaining of his conduct. Where a wife was on trial, accused of the murder of her husband, it was competent to show ill will or bad feeling on her part toward him near the time of the alleged homicide, or a course of conduct or series of statements on her part, continuing until shortly before the alleged homicide, for the purpose of showing motive or malice on her part and to rebut the presumed improbability of a wife murdering her husband. If the evidence showed only a single instance of complaint of the conduct of the deceased, or a mere appearance of being mad several months before the death of her husband, without more, its admissibility would be very doubtful, and if admitted it would be of small importance. But if it is sought to show a line of conduct or course of ill treatment on the part of a wife toward her husband near the time of the homicide, such evidence would be admissible. *Roberts v. State*, ante, 146.

3. The house in which the deceased and his wife lived was burned immediately after the deceased was shot. A trunk was saved from the fire. A witness for the State was asked whether all the bedclothes in the house were burned, and answered, "I don't know; I had a good many gone that I never have seen." Objection was made to this, on the ground that it sought to prove the character of the defendant; but the objection was overruled. If erroneous, this ruling was wholly immaterial, as the witness testified: "She was washing for us, and sometimes she kept things there for several days. She done our washing and ironing. I didn't consider that she stole any of it. It is not unusual for washerwomen to keep things over from one week to another." It was equally immaterial that defendant's counsel was not allowed to ask a witness for the State this question: "That was getting along for negroes pretty well for six months, wasn't it?"

4. A witness for the State testified that he had received and seen certain letters written by the defendant, asking that her clothing be sent to her, she having been away from home for

several weeks. On the direct examination he spoke of these letters as being from the defendant. But on the cross-examination he said that he did not know that the defendant wrote them, or that she authorized any one to write them, or that she was advised of their contents. On redirect examination he stated that the name of the defendant was signed to the letters; that they referred to her husband, and some of them were directed to him and some to the witness; that they came by mail from Macon, but the witness did not know that the defendant was in Macon, except from the letters; that she told the witness she was going to Macon. Defendant's counsel moved to rule out this evidence, but the motion was overruled. This was error. There was no proof that the defendant wrote the letters, or that they were in her handwriting, or were authorized by her; nor was the mere fact that they contained a request that clothing be sent to her such an identification as to make them admissible in evidence.

5. A physician was introduced by the State, who testified in regard to the wounds found upon the body of the deceased. On cross-examination he was asked the following question: "Now, Doctor, if a man has sworn that the bullet entered on the left about where my finger is and penetrated to the skull back toward the ear, he is mistaken, is he not?" It was stated that an affirmative answer was expected. Counsel for the State objected to the evidence, and the court said: "No, I don't think that is competent. You can show where the wound is from the witness, and then it is a question for the jury." It does not appear where counsel who asked the question placed his finger, or what was the location indicated by the language,—or whether it corresponded with the place on the skull which had been referred to by the other witness or not. It is therefore impossible for this court to determine whether or not the question was a proper one, or whether any error hurtful to the defendant was committed.

6. The court charged, in effect, that if the jury believed that there was some other hypothesis equally as reasonable as that of guilt, such as that some other person than the defendant committed the offense, or that the deceased took his own life, the jury would not be authorized to find the defendant guilty. At another time he charged as follows: "If it is as reasonable

that the deceased committed suicide, under the evidence in this case, as that the defendant shot him, then you would not be authorized to find her guilty; or as reasonable that some other person might have inflicted the wound, under those circumstances, you would not be authorized to find her guilty. But, if there are none as reasonable as that the defendant committed the act, you would be authorized to find her guilty as charged in the indictment." These charges were erroneous. In criminal cases depending entirely upon circumstantial evidence, in order to convict it is not sufficient that the hypothesis of guilt is the more reasonable; nor is it necessary, to authorize an acquittal, that there must be some other hypothesis equally as reasonable as that of guilt. This would seem to make the question of conviction or acquittal depend on the mere preponderance of reasonableness or probability among several hypotheses, and to require a conviction unless there were some other hypothesis just as reasonable as that of guilt. Such a rule, in a trial for murder, would be to make an issue of life or death turn upon whether different hypotheses were exactly balanced, or whether one preponderated slightly over the other. The true rule is, that, "to warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." Penal Code, § 984.

7. In the absence of a proper request, there was no error in failing to charge the law in regard to weighing the testimony of witnesses in case of conflict.

8. The jury having returned their verdict into court, while it was being received the foreman arose and asked the presiding judge if the jury could find that the defendant should be punished for a less term of years than her lifetime, to which the judge replied that they could not do so under a verdict of guilty. It was urged that this was error, and that the court should have remanded the jury to their room with instructions to make up and agree upon a verdict satisfactory to them. It does not appear that any request was made to poll the jury, or to have them return to their room for further consideration, or that any member of the jury failed to agree to the verdict as rendered. It seems to have been the unanimous verdict of the jury, properly returned, re-

ceived and recorded, and the mere inquiry on the part of the foreman as to the extent of the sentence did not furnish any ground for a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

SHIVERS v. THE STATE.

FISH, P. J. 1. For one charged, under an accusation in the county court, with a misdemeanor to avail himself of the right to demand an indictment, he must make such demand in "a writing signed by him." Penal Code, § 751. An oral demand made by his counsel is not sufficient.

2. It is not essential that such accusation charge the commission of the crime on the same day as that alleged in the warrant upon which the accusation is based.

3. The evidence warranted the verdict, and the certiorari was properly overruled.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 19, — Decided August 1, 1905.

Certiorari. Before Judge Spence. Worth superior court. April 24, 1905.

Perry & Tipton, for plaintiff in error.

W. E. Wooten, solicitor-general, and *Payton & Hay*, contra.

HARRIS v. THE STATE.

CORB, J. The only special assignment of error in the motion for a new trial being upon the admission of evidence, and it not appearing from the motion what objection was made thereto at the time the same was offered, the assignment of error can not be considered. The evidence warranted the verdict, and there was no abuse of discretion in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 20 — Decided August 1, 1905.

Indictment for profane language in presence of female. Before Judge Burch. City court of Dublin. April 24, 1905.

Howard & Baker, for plaintiff in error.

G. H. Williams, solicitor, contra.

RENTFROW v. THE STATE.

1. Even though the admission of the testimony objected to may have been erroneous, the error was subsequently cured by the action of the trial judge in ruling the evidence out and instructing the jury to disregard it.
2. An essential element of voluntary manslaughter is passion on the part of the slayer. The fact that the person slain may himself have been actuated by violent passion, in the absence of any demonstration by him against the slayer, has no bearing upon the grade of the homicide. Unless it be shown that the person killing was so overcome by passion as to exclude all idea of deliberation or malice, the killing is not voluntary manslaughter. Tested by this rule, there was no manslaughter in the present case.

Argued June 20,—Decided August 1, 1905.

Indictment for murder. Before Judge Reagan. Fayette superior court. May 13, 1905.

A. O. Blalock, J. W. Wise, and H. M. Dorsey, for plaintiff in error. *John C. Hart, attorney-general*, and *O. H. B. Bloodworth, solicitor-general*, contra.

CANDLER, J. Stephen Rentfrow was tried for the murder of his daughter-in-law, Mary Rentfrow, and was found guilty with a recommendation that he be sentenced to the penitentiary for life. He made a motion for a new trial, which was overruled, and he excepted.

1. The motion complains that the court erred in admitting evidence to the effect that the character of the accused for violence was bad, over the objection, made at the time the evidence was offered, that only the general character of the accused was in issue, and that evidence as to his character for any particular trait was inadmissible. Regardless of the merit of this objection, it appears that before the argument began the court ruled out the evidence objected to, and instructed the jury to disregard it; and so, conceding that the admission of the evidence in the first place was erroneous, that error was completely cured, and the accused has no ground for complaint.

2. The two remaining grounds of the amendment to the motion for a new trial both complain, in effect, that the court erred in failing to give in charge to the jury the law of voluntary manslaughter; and this is really the controlling question in the case. The case is, on its facts, a very peculiar one. The accused is an aged man—nearly fourscore years old—and the deceased,

as has already been stated, was his daughter-in-law. It is inferable from the testimony of the witnesses that there had long been bad feeling between the families of the two, and that the entire story of the causes leading up to the homicide is not disclosed by the record brought to this court. The only eye-witness to the tragedy was Ross Rentfrow, the husband of the deceased and the son of the accused. From his testimony it appeared that the killing took place between six and seven o'clock in the morning. Witness and his wife were living on land belonging to the accused. As witness was preparing to go to work, he observed the accused, at a distance of nearly two hundred yards from the house where he and his wife were, apparently about to go through a garden which the latter had cultivated. Witness thought he was going to tear up the garden; whereupon he called his wife's attention to the matter. "She watched him until he got to the garden; then she taken her gun and said she was going to make him get out of her garden. He had threatened to tear the garden all to pieces. . . She just said he had to get out of the garden; that she and her children had worked it and made it. . . I said if I was her I would not go. She said she would go or die." The gun was loaded. The deceased then went to the garden, carrying the loaded gun, while witness remained at the house, a distance of 175 yards intervening. As to whether witness could hear what conversation took place between the accused at that distance the record is not clear. He testified: "She asked him to get out of the garden, that she had worked and made it; and that is what I testified. She kept saying something else." The accused then picked up a basket which he had been carrying and which contained a pistol and some cabbage, "and got it up in his arm. He started out toward home, and she started to turn and start home. He threw the things down and commenced shooting. . . She was running from him at the time he done the shooting, and he kept advancing on her." Three shots were fired by the accused, two of which struck the deceased, one in the hand and one in the back of the head. The deceased and the accused were fifteen or twenty feet apart when the shooting took place. While the accused was firing, the gun which the deceased carried with her was discharged, apparently accidentally. Of the witnesses who heard the firing but did not see the occurrence, some testified that the

shots were in such rapid succession that they could not tell which was fired first, the pistol or the gun; others were positive that the pistol shots were fired first. No witness testified that the gun was fired before the pistol. The statement of the accused was to the effect that his first knowledge of the presence of the deceased near him was when he heard her call angrily to him to get out of the garden; that he looked up and saw that she had the gun pointed at him; that she repeated her demand that he get out of the garden, called him an "old gray-headed rascal," and threatened to kill him; that immediately thereafter she fired upon him, and that he was compelled to shoot to save his own life.

"Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever." Penal Code, § 64. "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied.

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible." Penal Code, § 65. It will be seen that the one essential element of voluntary manslaughter is passion—hot blood. When an unlawful killing is shown by the State, the presumption is that it was prompted by malice; and to reduce the homicide below the grade of murder it is necessary for the evidence to show the absence of malice. If the state of mind of the accused in the present case could be inferred from that of the deceased at the time when she seized her gun and announced her determination to make him get out of her garden, a jury might well have found that he was actuated by passion rather than malice. There is in this case, of course, no question of mutual combat. The meeting was sudden and unexpected, and immediately preceded the homicide. And it must be borne in mind that the mental state of the accused—not that of the deceased—is the test to determine whether a homicide be manslaughter. Was there an "actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing?" Only by the statement of the accused can such a theory be upheld; and it is well settled

that, in the absence of a request, the judge is not bound to charge upon any theory whose sole foundation is in the prisoner's statement. Were there "other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied?" If so, no witness testified to them. The woman's husband testified that she made no demonstration whatever against the accused; and that when shot she was retreating. Her state of mind when she left the house, the purpose for which she carried her gun, and her intentions towards the accused cast no light on what took place after she reached the garden; and that is the main thing to be determined in ascertaining whether or not there is manslaughter in the case. The case made by the State was one of brutal assassination. That made by the statement of the accused was one of justifiable homicide in self-defense. There is nothing to show that the accused was actuated by the sudden and ungovernable passion which the law recognizes as necessary to reduce a homicide below the grade of murder; and we will not reverse the judgment of the trial court on account of the failure to charge the law of manslaughter.

The foregoing discussion renders it manifestly unnecessary to discuss the contention that the verdict was contrary to law and the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

EDWARDS v. THE STATE.

1. Under the decision in *Papworth v. State*, 103 Ga. 36, and later cases, the act of September 12, 1881 (Acts 1881-2, p. 608), prohibiting the sale of spirituous, malt, or intoxicating liquors within the limits of Jefferson county, was unconstitutional.
2. While the offense of retailing spirituous liquors without a license can not be properly charged against one who sells such liquors in a county where prohibition exists under a valid statute, such offense can be committed in a county where prohibition does not exist for the reason that a special act attempting to provide for prohibition therein was itself unconstitutional.
3. This court will take judicial notice of the dates fixed by legislative enactment for the beginning of the sessions of the superior courts of the State.
4. Where a special presentment was returned at the November term, 1903, of the superior court of Jefferson county (which began its session on November 12), and charged that an offense was committed on November 8, 1903,

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this was sufficient to show that the alleged date of the offense was prior to the return of the presentment.

5. The verdict was supported by the evidence.

Submitted June 20, — Decided August 1, 1905.

Certiorari. Before Judge Holden. Jefferson superior court. May term, 1905.

A special presentment was returned against Fannie Edwards for selling liquor without a license in Jefferson county. The offense was charged to have been committed on November 8, 1903. The presentment was returned at the November term, 1903, of Jefferson superior court. The case was tried in the county court. A demurrer was filed to the presentment, on two grounds: First, because it was based on the general law of the State, as embodied in the Penal Code, § 431, which makes it criminal to retail without a license, and without taking the oath required by law; the objection urged being that there was at the time in force in Jefferson county a local law which made the sale of intoxicating liquors within that county penal, and no license could have been obtained. Second, because it does not affirmatively appear from the presentment that the crime alleged to have been committed was prior to the finding of such presentment. The demurrer was overruled. The evidence was clear that the defendant sold a half pint of whisky to certain persons for fifty cents. She was convicted, and carried the case to the superior court by writ of certiorari. The certiorari was overruled, and the defendant excepted.

Phillips & Phillips, for plaintiff in error.

LUMPKIN, J. (After stating the facts.) 1, 2. It is contended, on behalf of the plaintiff in error, that by the act of September 12, 1881 (Acts 1880-1, p. 608), the sale or furnishing of spirituous, malt, or intoxicating liquors within the limits of Jefferson county was prohibited, and therefore there could be no indictment and conviction for selling liquor without a license in that county. Where by a valid subsisting law the sale of liquor is entirely prohibited in a county, the provisions of the general law requiring retailers of liquor to obtain a license, and making it penal to sell without a license, have no application. An indictment and conviction for retailing liquors without a license in such a county can not be had. *Patton v. State*, 80 Ga. 714; *Batty v. State*, 411 Ga. 79; *Collins v. State*, 114 Ga. 70. But

if there is no valid act prohibiting the sale of liquor in the county, then the general law making it penal to retail without a license applies. The act of 1881, prohibiting the sale of spirituous, malt, or intoxicating liquors in Jefferson county, was unconstitutional, under the ruling in *Papworth v. State*, 103 Ga. 36, being violative of that clause of the constitution prohibiting special legislation in any case for which provision has been made by an existing general law. If the question decided in the *Papworth* case were now for determination for the first time, it might involve serious consideration as to whether some of the members of this court, as now constituted, would follow the reasoning of the majority in that case, or that set forth in the dissenting opinion of Mr. Justice Little. It is due to Mr. Presiding Justice Fish and Mr. Justice Cobb to say that they are still of the opinion that the views of the majority of the court in the *Papworth* case were correct. That decision, however, has been followed a number of times. See *O'Brien v. State*, 109 Ga. 51; *Embry v. State*, 109 Ga. 61; *Tinsley v. State*, 109 Ga. 822; *Smith v. State*, 112 Ga. 291; *Griffin v. Eaves*, 114 Ga. 65; *Harris v. State*, 114 Ga. 436; *Hancock v. State*, 114 Ga. 439.

It is true that in no case has the decision in *Papworth v. State* been affirmed by the entire bench of six Justices; and sometimes decisions of a less number of Justices are spoken of lightly, as if they scarcely ranked as decisions at all. This is a mistake. Decisions of less than six Justices are nevertheless decisions of the Supreme Court. Where all six Justices concur in a decision, it can not be overruled or materially modified except upon review, and then only with the concurrence of all the Justices. Decisions rendered by a less number of Justices do not require formal review, or the concurrence of six Justices, to overrule or modify them. Still they are decisions of this court, rendered after due deliberation, and should have weight as such. Civil Code, §5588; Acts 1896, p. 42, sec. 5. While all courts may sometimes find it necessary to modify or reverse their rulings, it is desirable that their decisions should be as uniform and as stable as practicable. They become rules of law on which the public rely and act, and confusion may arise from too great readiness to overturn former rulings. A number of local acts prohibiting the sale of liquors, without excepting

domestic wines, have been held unconstitutional. Prosecutions have taken place and convictions have been had under the general law prohibiting the retailing of liquors without a license. In some of these counties elections have been held under the local option law. Relying upon the decisions of this court as having established a fixed rule, the citizens of various localities have adjusted themselves to the law as thus declared. To overrule this long line of decisions would breed much confusion and trouble. We do not think it our duty to do so. The act of 1881, prohibiting the sale of liquors in Jefferson county, being unconstitutional, the general law of the State applied to that county, and retailing liquors without a license within its limits was a misdemeanor under the Penal Code, § 431.

It is suggested in the brief of counsel for the plaintiff in error, that by the act of August 9, 1881 (Acts 1880-1, p. 420), the sale of spirituous, malt, or intoxicating liquors in any quantity within the limits of the town of Louisville was prohibited, and that the sale involved in this case was within the limits of that town. It does not appear that any such point was raised or decided in the court below. If it were so, the ruling in the *Papworth* case would seem to apply equally to this act. It is further contended in the brief of counsel for the plaintiff in error, that, under the act of February 5, 1866 (Acts 1865-6, p. 282), the right to issue licenses for the sale of liquors in the town of Louisville was vested exclusively in the corporate authorities thereof; that by the act of 1900 (Acts 1900, p. 313) they were forbidden to issue licenses for the sale of liquors; that thus there was no authority in any person to issue such licenses, and hence there can be no conviction for retailing liquors without a license within the municipal limits. Want of authority in the municipal officers to issue a license would not authorize retailing without a license, or prevent such conduct from being criminal. The Penal Code, § 431, declares it to be a misdemeanor to "sell by retail any wine, brandy, rum, gin, or whisky, or other spirituous liquors, or any mixture of such liquors, in any house or other place, without license from the proper authority in said county, or without license from the corporate authorities of any town or city, where by law authority to grant license is vested in such corporate authorities." That the corporate authorities may be without power

to grant a license to retail lawfully will not operate as a license to retail unlawfully.

3, 4. This court will take judicial notice of the fact that the superior court of Jefferson county, by act of the legislature, begins its fall session on the second Monday in November. In the year 1903 that day fell on the 12th day of the month. The special presentment was returned at that term. The point that the presentment fails to show that the date of the alleged offense (November 8, 1903) was prior to the return of the presentment is accordingly without foundation.

5. The evidence amply supported the verdict.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

BENNING v. THE STATE.

EVANS, J. This case is controlled by the case of *Edwards v. State*, this day decided. Ante, 542.

Judgment affirmed. All the Justices concur, except Simmons, C. J. absent.

MC ELROY v. THE STATE.

FISH, P. J. Until there has been a judgment finally disposing of the case in the trial court, the Supreme Court has no jurisdiction to pass upon an assignment of error complaining of the striking of a plea of former jeopardy, filed by the accused. *Fugazzi v. Tomlinson*, 119 Ga. 622, and cit.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 20, — Decided August 1, 1905.

S. C. Crane, for plaintiff in error.

C. D. Hill, solicitor-general, contra.

YOUNG v. THE STATE.

COBB, J. 1. The evidence authorized an instruction on the law of voluntary manslaughter.

2. The extracts from the charge of which complaint is made were not erroneous for any reason assigned.

3. The evidence warranted the verdict, and no reason appears for reversing the judgment refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 20, — Decided August 1, 1905.

Conviction of manslaughter. Before Judge Roan. Fulton superior court. May 22, 1905.

Burton Cloud and Harvey Hill, for plaintiff in error.

C. D. Hill, solicitor-general, contra.

MATHIS v. THE STATE.

COBB, J. The evidence amply warranted the verdict, and none of the assignments of error disclose any sufficient reason for reversing the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 10, — Decided August 1, 1905.

Accusation of selling liquor. Before Judge Henderson. City court of Vienna. May 31, 1905.

Watts Powell and Busbee & Busbee, for plaintiff in error.

E. F. Strozier, solicitor, contra.

CLEMENTS v. THE STATE.

LUMPKIN, J. 1. The evidence in this case proved the defendant guilty of murder, and there was nothing to require a charge on the subject of manslaughter.

2. The mere allegation, in a ground of a motion for a new trial, that while the defendant in a criminal case was making his statement a woman in the gallery or back part of the court-room burst out crying and sobbing loudly, but was immediately removed by the sheriff under the order of the court, who thereupon refused to declare a mistrial, furnishes no ground for reversal, it not appearing who the woman was or how the defendant was injured by the occurrence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 10, — Decided August 1, 1905.

Indictment for murder. Before Judge Reagan. Henry superior court. June 10, 1905.

Clements was indicted for the murder of Will Stephenson. He was convicted, with a recommendation that he be imprisoned for life. He moved for a new trial, which was refused, and he accepted. The evidence on behalf of the State showed, in brief, the following facts: Stephenson was in a store when the defendant came up. As he and others stepped out of the store the defendant was standing near by. He grabbed Stephenson, cursed

him, had a drawn pistol, and said: "You run home and got your pistol to kill me with." Stephenson denied this, but the defendant insisted that it was true, and said: "I have got a notion to shoot you anyhow." Stephenson answered: "I have not done anything to you; what do you want to shoot me for? I have not got my pistol; if you will go with me I will show you." The defendant told him to hold up his hands and asked a person near by to come and get the pistol out of Stephenson's pocket. The person addressed declined to do this. Stephenson ran and the defendant pursued him, shooting at him three times. Two shots took effect, one in the leg and the other in the back, resulting in Stephenson's death. He was trying to get around the corner of the house. During the same evening and previously to the homicide the defendant had said that if he found Stephenson that night he would kill him. The evidence for the defendant did not materially differ from that for the State, as to the occurrences at the time of the homicide. One witness testified that on the night of the shooting Stephenson came to his store, asked if any one had seen the defendant, and said that he wished to find him; that the witness told the defendant that Stephenson was hunting for him, and that he had better not go where the latter was; that Stephenson came to the store a second time and asked for the defendant, and the witness also told this to the defendant; and that Stephenson had said that it would be bad for defendant if he found him. Another witness testified that when Stephenson came into the store he inquired for the defendant; and also that when the defendant thrust his pistol into Stephenson's face and required him to throw up his hands, the latter held them up part of the way "but twisted around like he was trying to put them in his pocket."

Brown & Brown and E. M. Smith, for plaintiff in error.

John C. Hart, attorney-general, and O. H. B. Bloodworth, solicitor-general, contra.

JAMES v. THE STATE.

FISH, P. J. 1. The evidence for the State, if credible, warranted a verdict for murder. The evidence for the accused and his statement, if believed, showed complete justification. There was nothing in the evidence or the statement of the accused, considered separately or together, tending

to show, or from which the jury could legitimately infer, that the homicide was voluntary manslaughter. It was therefore error to give in charge the law relating to voluntary manslaughter, and a verdict finding the accused guilty of that offense was without evidence to support it. *McBeth v. State*, 122 Ga. 787.

2. Neither was there anything in the evidence or the statement of the accused to support the theory of mutual combat. Accordingly it was error to give in charge section 73 of the Penal Code. See *Jordan v. State*, 117 Ga. 405, and cit.

3. The court did not err in admitting or excluding evidence.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued July 10, — Decided August 1, 1905.

Conviction of manslaughter. Before Judge Spence. Dougherty superior court. June 14, 1905.

J. W. Walters and *I. J. Hofmayer*, for plaintiff in error.

W. E. Wooten, solicitor-general, by *R. R. Arnold*, contra.

COBB v. THE STATE.

CANDLER, J. 1. In the light of the judge's certificate to the bill of exceptions, there was no abuse of discretion in refusing to continue the hearing on the certiorari; nor, in view of the circumstances, was it error to hear the argument on the certiorari, reserving judgment thereon, and, in the interval between the hearing and the judgment, consider and dispose of affidavits submitted in support of a traverse to the answer of the trial judge. This case differs from *Phillips v. Atlanta*, 78 Ga. 773, in that there the main case was decided before the traverse was ever disposed of, while in the present case the traverse was heard and overruled before there was any judgment on the certiorari.

2. Of those exceptions to the answer of the trial judge which were overruled by the judge of the superior court, some are too vague and confused to present any question for decision by this court, while the remainder relate to matters which have no substantial bearing on the decision of the certiorari. The assignment of error upon the overruling of these exceptions is therefore without merit.

3. For none of the reasons assigned in the bill of exceptions and argued in the brief of counsel for the plaintiff in error was it erroneous to overrule the certiorari.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 10, — Decided August 1, 1905.

Certiorari. Before Judge Littlejohn. Dooly superior court. May 27, 1905.

Busbee & Busbee, for plaintiff in error.

F. A. Hooper, solicitor-general, and *E. F. Strozier*, contra.

SWAN OIL COMPANY v. LINDER.

Specific performance "will not be decreed of a voluntary agreement or merely gratuitous promise," except in a case where possession of land has been surrendered upon a meritorious consideration, and valuable improvements have been made thereon upon the faith of the promise. Civil Code, §4039. It follows that a naked promise resting in parol will not be enforced against the promisor, notwithstanding he may have encouraged the person to whom he made the promise to expend money on the faith thereof, the expenditures made being for his own benefit and not for or in behalf of the promisor, who received no benefit therefrom. Under the facts alleged in the present case, the plaintiff was not entitled to the relief sought, and the action was properly dismissed on demurrer.

Submitted April 14, — Decided August 1, 1905.

Equitable petition. Before Judge Holden. Hart superior court. January 7, 1905.

The assignment of error made in the bill of exceptions is that the court on demurrer dismissed the plaintiff's action. The facts relied on by the plaintiff company and set forth in its petition were substantially as follows: It was incorporated, under the name of the Swan Oil Company, May 26, 1902, for the purpose of engaging in the business commonly carried on by the proprietors of oil-mills, the promoters of the enterprise being James Swan, A. J. Little, and others. Before applying for a charter, they authorized Little to buy up certain property in the town of Hartwell on which to locate the company's plant, and furnished him with the purchase-money, he agreeing to convey the property to the company when incorporated; he accordingly bought the property from W. T. Johnson and J. C. Massey, taking deeds thereto in his own name, but afterwards conveying the property to the company. Prior to making this purchase, Little went to T. J. Linder, who was operating the Hartwell railroad under a lease from the Hartwell Railway Company, and stated to him the object and purpose of the intended purchase of the property from Johnson and Massey, at the same time saying the purchase would not be made unless a practicable and convenient right of way could be obtained from him, as lessee of that company, from the main track of the railroad to the property of Johnson and Massey, running across certain streets and over two vacant lots belonging to the railway company. Linder promised Little that, as soon as the plaintiff company was incorporated, he

would deed to it the desired right of way. Thereupon Linder carried Little to a point on the railroad near where the main line crossed Jackson street, and pointed out the proposed right of way for a spur-track from that point to the property on which the promoters of the plaintiff company desired to build its oil-mill. The route thus agreed on is the only practicable way to enter the property purchased from the main line of the railway. In pursuance of this agreement on the part of Linder to lease this right of way, Little purchased the property from Johnson and Massey at a cost of \$2,100. Under the contract of lease held by Linder from the Hartwell Railway Company, Linder had the right to lease to plaintiff the proposed right of way. After plaintiff was incorporated, Little, acting as its agent, presented to Linder a writing to be signed by him, leasing to the plaintiff the desired right of way, and at the same time also requested of Linder a grant of a building privilege on one of the vacant lots belonging to the railway company. Linder replied he would sign the lease for the right of way and would also grant the building privilege requested; but proposed that plaintiff wait till he could confer with the officers of the railway company about granting the building privilege, saying that if it was agreeable to them he would grant both the right to build on the vacant lot and the proposed right of way. Plaintiff had previously, acting on the faith of Linder's agreement to give it a right of way, begun valuable improvements on the property purchased by it, and Linder on this occasion requested plaintiff to go on with these improvements, as he would sign the lease granting the right of way in any event. "The principal reason and consideration that induced said Linder to give petitioner a right of way over said land" of the railway company, and to allow petitioner to connect a spur-track from its oil-mill with the main line of that company, was that "petitioner should and would be obliged to patronize the said Hartwell railroad, running from Hartwell to Bowersville, which said Linder was operating under said lease from the Hartwell Railway Company, with all shipments of freights to and from said oil-mill, and that the building of said oil-mill in Hartwell on the proposed location as aforesaid, would greatly benefit said Linder and said Hartwell Railway Company by increasing the earnings of said Railway Company over and from its road." Without this right of way

and spur-track plaintiff can not build its oil-mill and operate its business on the site purchased, without such expense in hauling its products and raw material as to destroy all profits and to prevent carrying on the business save at a loss. Plaintiff has several times requested Linder to sign a lease covering the desired right of way, but he has refused so to do, notwithstanding he had that right under his lease from the railway company. At the suggestion of Linder that its main line might at an early day be changed to a standard-gauge road, plaintiff went ahead and purchased \$101.76 worth of standard-gauge cross-ties with which to build the proposed spur-track, shipping these ties over the railroad under the control of Linder to the town of Hartwell, at which point they were by his direction unloaded at the place near Jackson street where he had agreed to allow the spur-track to be connected with the main line. Besides paying to Linder the freight on these cross-ties, plaintiff also paid him freight on a quantity of building material to be used in the erection of its oil-mill, also expending large sums in improving its building site, the aggregate amount expended being some \$1,580.13 in addition to the \$2,100 paid for the land purchased on the faith of Linder's agreement, which land will be practically worthless unless it can be reached by a spur-track. The plaintiff alleged that the refusal of Linder to comply with his agreement was "unfair, unjust, and injurious and damaging to petitioner, rendering petitioner unable to build and compete with other mills;" that he has, "by his fraudulent conduct, by his deceitful means and willful promises, led your petitioner into considerable expense in procuring" a charter, employing lawyers, etc., in the sum of \$500, or other large amount; and the plaintiff prayed that Linder be required to execute to it a lease to the right of way described in its petition, or, if for any reason this relief could not be afforded, that plaintiff have judgment against Linder for the damages it had sustained by reason of his refusal to execute such lease.

The demurrer was based on both general and special grounds, one of these grounds being that the parol agreement to lease was within the statute of frauds, and another being that the facts alleged were not such as to entitle the plaintiff to equitable relief of the nature sought.

J. H. Skelton and J. N. Worley, for plaintiff.

W. L. Hodges and A. G. & Julian McCurry, for defendant.

EVANS, J. (After stating the facts.) It is now well settled in this State that specific performance of a parol contract as to land will be decreed, "if it be so far executed by the party seeking relief, and at the instance or by the inducements of the other party, that if the contract be abandoned he can not be restored to his former position." Civil Code, § 4037. Relief will likewise be afforded where "there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance." Civil Code, § 2694 (3). But it does not follow that a promise made without consideration is enforceable in a court of equity merely because the person to whom it is made has, relying upon its fulfilment, acted to his prejudice. Where there is a contract which would be binding on both parties if it did not rest wholly in parol, the interposition of a court of equity, after the contract has been partly performed on one side, is justified, to prevent positive fraud being perpetrated by the party who then repudiates the contract and refuses to himself perform. And we have cases in which a gift has been enforced, where the donee has actually entered on land in reliance on a parol promise to deed it to him and has, at the donor's instance, made valuable improvements thereon; for in such a case the donor would profit by his fraudulent conduct to the extent of the value of the improvements made, were he permitted to break his promise. *Porter v. Allen*, 54 Ga. 624; *Jones v. Clark*, 59 Ga. 136; *Hughes v. Hughes*, 72 Ga. 173; *Howell v. Ellsberry*, 79 Ga. 475. What was the character of the alleged agreement by Linder in the present case? According to the most favorable view of the plaintiff's allegations, it was a promise to give the plaintiff a valuable right of way; there is no pretense that there was any consideration for this promise; what induced Linder to make it were such incidental benefits as he believed might flow to him by the plaintiff being placed in a position where its interests would dictate that it should make shipments over the road which he controlled. It is to be observed that the plaintiff was not bound to apply for a charter, or to erect an oil-mill, or, in the event it should be incorporated and should elect to build its

plant and lay a spur-track to the main line, to ship any freight, save at its option, over the line of railway which Linder had leased and was operating. Imagine the absurdity of his predicating a suit for damages upon the failure of the plaintiff to erect its plant and to furnish shipments to his road, had the plaintiff, after it was incorporated, abandoned its project, or, after erecting its mill, elected not to build a spur-track or to furnish any shipments of freight to him. The so-called "agreement" between the parties was entirely unilateral. *Morrow v. Southern Express Co.*, 101 Ga. 810; *Huggins v. Cement Co.*, 121 Ga. 311; *Swindell v. National Bank*, 121 Ga. 714. Were Linder compelled to perform his promise by executing to the plaintiff a lease to the coveted right of way, how would the parties then stand? At its option the plaintiff company could go on and build its plant or abandon the enterprise; and after it erected the mill, the company would be under no obligation to furnish shipments to Linder or have shipments to it made over his line, inasmuch as the company has never undertaken to bind itself to pay or to do anything whatever in consideration of his executing a lease to a right of way for its spur-track. The courts can not, of course, make a contract for the parties; and the question is, can the agreement of Linder be enforced against him because he has encouraged the plaintiff to expend money upon the faith of his complying with his naked promise to make to it a valuable gift necessary to the complete enjoyment of its property. He has not profited by the expenditure of any of this money; he will not profit therefrom or from the carrying out of the plaintiff's commercial enterprise, save at its pleasure and in a measure it shall determine for itself; he can not force it to perform. *Harrison v. Lumber Co.*, 119 Ga. 6. The case is not one like that of *McCaw Manufacturing Co. v. Felder*, 115 Ga. 408, where one party makes a continuous proposal to do something for another, or to sell or furnish him something, if he, in return, will do or bind himself to do something for the former. In such a case, if the proposal be accepted before it has been withdrawn, mutuality is not lacking, and both parties become bound to perform their respective obligations. If the one who makes the proposal does not withdraw it before the other, with his express or implied assent and appro-

bation, enters upon a performance of the obligations which it was proposed he should undertake, and expends money in so doing, the want of mutuality in the first instance because he did not bind himself to perform will not excuse the other from living up to the terms of his proposal. *Fontaine v. Baxley*, 90 Ga. 416.

Our code, however, expressly declares that specific performance "will not be decreed of a voluntary agreement or merely gratuitous promise" in any case except one, viz, where possession of lands has been given under such an agreement, upon a meritorious consideration, and valuable improvements have been made upon the faith thereof. Civil Code, § 4039. Nor has the letter of this section been broadened by construction to meet cases which might well have been included in the exception. *Thompson v. Ray*, 92 Ga. 285, where during the life of the donor materials with which improvements were made after his death were purchased with his knowledge. In *Peacock v. Deweese*, 73 Ga. 570, the court declined to give its aid to the plaintiff, because the agreement he relied on was unilateral, he not having bound himself to do anything, save at his option, for the benefit of the defendant. To break a promise wholly without consideration does not constitute legal fraud, and the mere fact that the person to whom the promise is made is thereby induced to act as he would not otherwise have done will not of itself alone afford ground for equitable interference or redress. Where the aggrieved party's complaint is that he expected to get something for nothing, and, so expecting, expended money for his own benefit, not that of the promisor, which he otherwise would not have done, his loss of expectations and money is to be attributed to his own folly rather than to fraud on the part of the promisor, who never legally bound himself to perform, as his disappointed promisee was bound to know. Especially where, as in the present case, the alleged promise was not only gratuitous but was in parol, the statute of frauds should not be emasculated. Our Civil Code, § 4039, does not take such a case out of the statute, but declares that the promise, being wholly without consideration, can not be specifically enforced, without qualifying this declaration in any way, or providing that money expended by the promisee on the faith of the promise will render it obligatory upon the promisor. The

plaintiff has done nothing, nor does it propose to do anything, in pursuance of any *contract* with the defendant. The case stated is even less meritorious than that of *Simonton v. Ins. Co.*, 51 *Ga.* 76, wherein this court declined to enforce a parol contract of insurance relied on by the plaintiff. A policy was issued by the company, covering a stock of goods of the plaintiff while contained in a certain house, from which he subsequently commenced to remove the goods to another house, and while so engaged was asked by the company's agent if he desired his policy transferred; plaintiff replied, by all means, if necessary, and the agent consented to the removal and promised to make the necessary entry on the books; thereupon the plaintiff continued the removal, took out no new insurance, and his goods were subsequently destroyed by fire. This court held that "this was not such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing." In the case of *Milledgeville Water Co. v. Edwards*, 121 *Ga.* 555, the defendant company set up the defense that the contract was lacking in mutuality; but, as was pointed out by Mr. Justice Candler, this point was not well taken, for the promise of the company was based on a valuable consideration, and the company had, after the plaintiff had gone to large expense in complying with his obligations, for some time supplied him with water under that contract. The real objection to it was that it was indefinite as to the time of its continuance; but after it had been so far carried into effect, the plaintiff had a right to enjoin the company from cutting off his water supply until such time as the benefits flowing to him from a continuance of the arrangement entered into would in value approximate the outlay he had incurred in putting down the supply pipe he had obligated himself to lay for their joint use and benefit. The present case is quite dissimilar. If the plaintiff had been permitted to lay the proposed spur-track and had completed its plant, then or thereafter obligating itself to make all shipments of freight it might have in the conduct of its business over the defendant's railroad, doubtless a court exercising equity jurisdiction would well be justified in enjoining the defendant from interfering with the plaintiff's use of the spur-track until it had reaped the contemplated benefits from its outlay in building the same; but such is not this case. The *Edwards* case,

just cited, is in accord with the line of cases holding that even a parol license, without consideration, is not revocable at the will of the licensor after the licensee has been permitted by him to expend money on the faith thereof, although no definite period was fixed for the duration of the license. The present case is unlike any with which we have heretofore been called on to deal; and we are of the opinion that the court below would have been unwarranted in so stretching its equitable powers as to grant the relief sought.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

EADY v. NEWTON COAL AND LUMBER COMPANY.

123	557
129	586

1. An agreement between a customer and a member of a partnership, that its goods may be purchased and paid for by the customer in commodities furnished by him for the private use and benefit of such member of the firm, is void, as being beyond the scope of the partner's apparent authority. So much of the decision in *Perry v. Butt*, 14 Ga. 699, as is in conflict with the above is, upon a formal review, overruled.
2. Articles of partnership may be enlarged by implication from a general usage and habit of the firm, acquiesced in by all of the partners. But before such a custom would become binding upon a partner who did not expressly authorize it, the circumstances would have to be such as to indicate that he not only knew of the course of dealing in particular instances, but contemplated and tacitly assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases.

Submitted May 17, — Resubmitted July 5, — Decided August 1, 1905.

Complaint. Before Judge Hammond. City court of Griffin. January 2, 1905.

A partnership was formed in 1893 or 1894, under the firm name of H. P. Eady & Co., between H. P. Eady and J. A. Brooks, for the purpose of engaging in the wagon and buggy business and conducting a blacksmith and general repair shop. Brooks had charge of the books and looked after the office affairs of the firm, while Eady assumed the management of the shop. Shortly after the partnership was formed, Brooks approached J. M. Mills, manager of the Newton Coal & Lumber Company, and solicited the business of that concern, proposing to Mills that if he would give the patronage of his company to Eady & Co., the individual ac-

counts of its members for supplies purchased from his company would be allowed as a credit on such account as he might run with the partnership, and that they would in this manner "swap" accounts. Mills assented to this arrangement, and Brooks afterwards purchased from the Newton Coal & Lumber Company supplies for his individual use to the amount of \$113.51, and supplies for his firm to the amount of \$59.02. In January, 1898, Mills and Brooks effected a settlement of accounts, which included the individual indebtedness of the latter. Brooks made no entry of this settlement on the books of his firm, and his partner had no knowledge thereof or of the arrangement under which it was made. In June, 1902, Brooks effected another settlement with a representative of the Newton Coal & Lumber Company, whereby an account of \$19.36 against Eady & Co. and an account against Brooks of \$121.44 were satisfied. Eady was not present and took no part in this settlement, and the transaction was not entered on the books of his firm, nor did Brooks charge his individual account with the amount which he received thereunder. In April, 1903, the partnership was dissolved, and Eady became the sole proprietor of the business. Brooks was at the time hopelessly insolvent. On December 5, 1904, Eady, as the successor of the firm and as transferee of the accounts which it held against its debtors, brought suit against the Newton Coal & Lumber Company and the individuals who conducted business under that firm name, to recover \$200.80 on an open account claimed to be due by it to Eady & Co. The defendants filed an answer in which they admitted an indebtedness of \$16.65, but by special plea they set up the agreement made between the manager of the Newton Coal & Lumber Company and Brooks, one of the members of the firm of Eady & Co., and the settlement of the accounts made in pursuance of that agreement. The defendants alleged that Brooks was authorized to enter into this agreement; that it was made in the usual course of dealings which had prevailed for a number of years, with the knowledge and approval of all of the members of the two partnerships; and that the settlement of accounts was made with the knowledge and consent of Eady and in accordance with the custom recognized and followed by his firm in settling accounts between it and other firms in Griffin with which it transacted business.

On the trial of the case Brooks testified that he had no direct authority from Eady to enter into the agreement made with the manager of the Newton Coal & Lumber Company, but that Eady had knowledge that settlements of the character made with that company were effected with parties with whom his firm had business dealings, and that he never raised any objections to settlements being made which included the individual accounts of its members. Eady testified that he never authorized any such agreement, had no knowledge that it was entered into, and never consented to any settlement in accordance with its terms. As to transactions with other firms in Griffin, he explained that on certain occasions he had consented that, when parties called for a settlement of accounts, the indebtedness of the members of his firm should be entered as a credit on the demands which his firm had against such parties; but that in each instance the account against him individually had been presented to him, he had marked it "O. K.," and he and his partner had agreed that the settlement with the firm should embrace an allowance of the indebtedness held by its debtor against them individually. He denied that he had ever conferred upon Brooks any authority to make any such settlement without his express assent and approval. A number of merchants testified to having made settlements with the firm of Eady & Co., in which demands against the members of that firm were allowed. In some instances Eady was present and consented to this arrangement; in other instances the settlement was made with Brooks in the absence of Eady. Only one of the transactions of this nature which was made by Brooks without the express consent of his partner appeared on the books of the firm, and Eady undertook to swear positively that the entry thereof was made after the firm was dissolved, by changing a former entry of \$2.75 to \$580.95, and that he had no knowledge of this transaction till after he had become the sole owner of the business. After the dissolution of the partnership, Eady repudiated the agreement entered into between Brooks and the manager of the Newton Coal & Lumber Company, saying he had no information in regard to it and that the company would have to look to Brooks for the payment of his individual indebtedness to it. The defendants sought to show that Eady, in point of fact, knew of and tacitly assented to that

agreement; but the only evidence adduced on this point was to the following effect: After this arrangement was agreed on between Brooks and Mills, the latter was asked by Eady if he "didn't want a wagon." Mills replied, "You don't owe us quite enough to get a wagon yet," and Eady then said, "We will owe you enough." Subsequently Eady & Co. wanted to buy a car-load of coal. Mills went to the office of the firm, and in the presence of both members said that coal was sold at a very small profit and that he could not charge it — that he "could not swap accounts as to this." They accordingly paid cash for the coal, giving him a check for the price of it, and Eady took part of the car-load, Brooks part of it, and a part of it was devoted to the use of the firm. Several bookkeepers, who had at different times been in the employ of the firm, knew of the custom of settling the individual indebtedness of its members when settlements were effected between the firm and other business concerns, and they were under the impression that Eady knew of this practice, as he looked pretty closely after the business.

After both sides had announced closed, the court, on motion of the defendants, directed the jury to return a verdict for only the amount which they admitted to be due, \$16.65, holding that the plaintiff was not entitled, under the evidence, to recover the amount sued for. To the direction of this verdict exception is taken. Complaint is also made that the court admitted, over the plaintiff's objection, evidence as to the making of the agreement under which Brooks settled his individual indebtedness to the Newton Coal & Lumber Company, and as to the general custom of the firm of Eady & Co. to make, with persons with whom it dealt, settlements of the character effected by Brooks with the defendant partnership.

Robert T. Daniel and Marcus W. Beck, for plaintiff.

Lloyd Cleveland, for defendant.

EVANS, J. (After stating the facts.) 1. Counsel for the defendant in error insists that the agreement between Brooks and the manager of the Newton Coal & Lumber Company was an engagement in furtherance of the partnership business, which Brooks had the right to make and by which his copartner is bound. This proposition is claimed to be supported by the case of *Perry v. Butt*, 14 Ga. 699. The report of that case discloses

that the partnership concern did a cash and credit business and bartered goods for other articles. The defendant was a tavern-keeper, and, in a conversation with one of the partners upon the subject of boarding, said that when merchants or their clerks boarded with him, it was his custom to trade it out, and that he did not expect cash. It was the understanding that the tavern-keeper's charge for the board of one of the partners was to be allowed for any goods he might buy of the firm; the tavern-keeper had twice settled his account with the firm for goods purchased prior to the time the note in suit had been given, and in each settlement the partner's board had been allowed as a credit. These settlements were duly entered on the books of the firm. Upon these facts, the great judge who delivered the opinion of the court said that one partner, in furtherance of the joint business, may agree with a hotel-keeper that if he will deal with the firm, his account shall be settled by the board of the partners, and the contract will be binding on the firm. It is perfectly clear and manifest from the entire report of the case that the court did not intend to hold that one partner could sell the firm's goods for his private benefit. Otherwise it would have been entirely useless for the court to discuss ratification because of prior entries on the books. And to make it more clear that such was not the intent is the express recognition of the principle that one partner can not appropriate the partnership effects in payment of his individual debt. Still, as the language used is susceptible of the construction placed upon it by counsel for the defendant in error, leave was granted to review the ruling announced in the fifth division of the opinion filed in that case. We think the true rule of liability is well stated in *Worder v. Newdigate*, 11 B. Mon. (Ky.) 177: "If a firm sells goods and receives various commodities in payment, the act of one partner in relation thereto binds the firm, because it is in the course of its trade and done in the name and for the benefit of the partnership. But when goods are purchased to be paid for in commodities furnished, not for the firm, but for one of the partners individually, and this fact is known to the purchaser, the act of one partner in such a case does not bind his copartners unless they assent to it." To bind the partnership it is essential that a contract of this character be made not only in the name of the firm, but at least ostensibly

for the firm's benefit. Otherwise it will not be binding on the partnership. One of the reasons advanced why such a contract would be binding on the copartners is that a partner has a right to accept specifics in payment of the goods of the firm, and when firm goods are sold under a contract to be paid for in specifics for the individual use of one of the partners, and the goods are paid for in this way, a suit in the firm name to recover the value of the goods is not maintainable, because the goods have been paid for in terms of the contract under which they were purchased. *Fay v. Green*, 1 Aik. 71; *Strong v. Fish*, 13 Vt. 277; *M'Kee v. Stroup*, Rice, 291; *White v. Toles*, 7 Ala. 569 (overruled in *Cannon v. Lindsey*, 85 Ala. 198). The fallacy of this argument is that the truth of the premise is assumed. The goods have never been paid for; the firm has never received any quid pro quo from the customer. As was said in *Thomas v. Pennrich*, 28 Ohio St. 55: "The assumption is true if the setting off of a debt due the firm against the private debt of the partner is a payment of that debt. But it is conceded that a partner can not pay his own debt by using the firm property to that end." Other cases are based on the observation of Lord Ellenborough in *Henderson v. Wild*, 2 Campb. 561, to the effect that a receipt by one of the partners discharging the firm debtor in consideration of the settlement of a private debt of the partner executing the receipt is binding on the firm. *Halls v. Coe*, 4 McCord, 136. But this doctrine is repudiated by the great weight of authority, and recognition is given to the principle that one member of a partnership has no implied authority to dispose of property of the partnership in satisfaction of his individual debt or for his individual benefit. *Bank v. Rice*, 48 Neb. 428; *Evernghium v. Ensworth*, 7 Wend. 326; *Thomas v. Pennrich*, 28 Ohio St. 55; *Minor v. Gan*, 11 Sm. & Mar. 322; *Flower v. Williams*, 1 La. 22; *Atkin v. Berry*, 1 Tenn. 91; *Thomas v. Stetson*, 62 Ia. 537; *Dob v. Halsey*, 16 Johns. 34; *Cotzhausen v. Judd*, 63 Wis. 213; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Brooks v. Carpenter* (Ky.), 53 N. W. Rep. 40; *Taylor v. Rasch*, 23 Fed. Cas. 789; *McNair v. White*, 46 Ill. 211; *Bell v. Faber*, 1 Grant, 30; *Gullatt v. Tucker*, 2 Cranch C. C. 33.

Several American courts have followed the English case of *Jones' Assignee v. Yates*, 9 B. & C. 532, assigning as the reason

why a partnership could not sue for the value of goods sold by one of the partners to a customer, under an executed agreement that the goods were to be paid for by delivery of specifics to the partner's private use, that it would allow a plaintiff in a court of law to rescind his own act on the ground that such act was a fraud on some other person. *Greely v. Wyeth*, 10 N. H. 15; *Homer v. Wood*, 11 Cush. 62; *Craig v. Hulschizer*, 34 N. J. Law, 363. As was clearly demonstrated in *Purdy v. Powers*, 6 Pa. St. 494, "this action does not proceed upon a suggestion of mala fides or imputed fraud in one of the parties, but upon the foot of the original claim, springing from the debt contracted with the firm in the usual course of dealing, and there is nothing standing in the way of the action which requires to be rescinded." An agreement between one partner and a purchaser to sell partnership goods and receive in exchange therefor commodities to be applied to the private benefit of the individual partner is a void act, in that it is beyond the scope of the authority of a partner to make such an agreement, and the very nature of the agreement informs the purchaser that the firm is parting with its property and receiving nothing in exchange. A private agreement by one partner for his separate advantage would work a great injury to partnership assets, and thereby to associates in the firm and the creditors of it. Several cases upon practically the same facts as are involved in the case under consideration have been before the courts, and a brief reference to some of them may aid in illustrating our position. In *Brickett v. Downs*, 163 Mass. 70, *Brickett and Shorey* were coal dealers, and the defendant was a dentist. The suit was for the price of coal, and the defendant pleaded that *Shorey* was having teeth fixed in the defendant's office, and proposed that defendant take coal in part payment for dental work done and to be done for *Shorey* and his family, and to this proposition the defendant assented. At that time *Shorey* owed defendant from \$23 to \$27, and defendant soon afterwards did work that increased the bill to \$38.75. He had received the coal in part payment of his bill for dental work. *Knowlton, J.*, said: "To receive property of a partnership from one of the partners in payment of his personal debt, without the consent of his copartner, is no less a fraud upon the partnership than to pay a debt due the firm by doing or furnishing something for the

personal benefit of one of its members. Such an arrangement accompanying the receipt of partnership property would be void against the other partner, and would leave the party receiving the property liable on an implied contract to pay the firm its value." In North Carolina it was held that in an action by a surviving partner for a debt alleged to be due to the firm, the defendant can not avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, which was for the board of this partner, should be paid out of the store in which the plaintiff and the defendant's debtor were partners. *Norment v. Johnston*, 10 N. C. 89. In *Goode v. McCartney*, 10 Tex. 193, the plaintiff brought suit upon an account for merchandise sold the defendant. The latter pleaded in set-off an account for medical services rendered a partner of the plaintiff, who had furnished the goods under an agreement that the medical services rendered him by the defendant should be received in satisfaction. The court held that such an agreement between the customer and one of the partners did not bind the copartners; and the plaintiff was allowed to recover. To the same effect is *Pierce v. Pass*, 1 Porter, 232.

It has frequently been held that while a partner may apply partnership property to the payment of a partnership debt contracted in the prosecution of the partnership enterprise, he has neither a legal nor a moral right to appropriate partnership effects to the payment of his individual debt, without the assent of his partner. *Wise v. Copley*, 36 Ga. 508; *Harper v. Wrigley*, 48 Ga. 495; *Murphey v. Bush*, 122 Ga. 715. There can be no distinction in reason between the payment of a private debt with partnership assets and the delivery of partnership goods to one who engages to do or to give something in exchange for the exclusive benefit of one of the partners. In either instance the transaction amounts to a conversion of partnership property to the private use of one of the partners, with the knowledge of the person who receives the firm's property. Hence we conclude that an agreement between a customer and a member of a partnership that its goods may be purchased and paid for by the customer in commodities furnished by him for the benefit of such member of the firm is neither in furtherance of the partnership business nor within the scope of his apparent authority. See *Parsons on Part-*

nership, § 90, and cases cited. In so far as the decision rendered in *Perry v. Butt*, supra, conflicts with the views above announced, that decision is formally overruled. We are not constrained to follow the early English decisions hereinbefore referred to, as they were pronounced subsequently to the period mentioned in our "adopting statute" as the period to be looked to in ascertaining what was the common law as understood and declared by the courts of England prior to the Revolution.

2. During the course of his examination as a witness, Brooks was permitted to testify as to the custom of his firm with reference to making settlements with its customers which embraced accounts held by them against its members as individuals. This testimony was admissible, as the witness undertook to swear that his partner had knowledge of the custom which prevailed and raised no objection thereto. It is pertinent to remark, however, that before such a custom or business usage would become binding upon a partner who did not expressly sanction or authorize it, the circumstances would have to be such as to indicate that he not only knew of settlements being made in particular instances in accordance with the custom, but contemplated and tacitly assented to a regular course of dealing with the public rather than with a few customers who held small demands against the individuals composing the firm. The mere fact that in two or more isolated instances he agreed to a settlement whereby the customer was given credit for a private debt against his copartner would not suffice to establish his assent to a practice so general as to amount to a custom. It would have to appear that there was a general usage or habit of so conducting the affairs of the firm, acquiesced in by all of its members. 1 Bates on Partnership, § 319. In a case where a partnership had frequently drawn checks against its funds in bank for the purpose of paying the individual debts of its members, this court held there was not sufficient proof of such "a course of dealing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. *Peoples Savings Bank v. Smith*, 114 Ga. 185. A customer has no right to assume that because a partner expressly assents on one occasion to the allowance of a set-off of a demand for a particular amount held against his co-

partner, a like assent will be given to a similar settlement on another occasion, or that his copartner has any authority to bind the firm by any promise to settle its accounts in this manner.

What is said above disposes of all the questions which the record before us presents for determination. The next trial of the case should be conducted in accordance with the rulings above announced.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

WYNNE v. THE STATE.

1. For the admission of evidence to be a ground of a motion for a new trial, it must appear what objection was urged to it at the time. It is not enough to state what the objection was at the time when the new trial is asked.
2. A barbecue on the fourth of July, at which people are assembled to the number of four hundred or five hundred, is a "public gathering" within the meaning of the Penal Code, § 342, which declares it to be a misdemeanor for one not an arresting officer in the discharge of his duties, or a member of his posse, to carry about his person a deadly weapon to any public gathering, except at militia muster grounds.
3. If a person knowing that a public gathering would occur at a certain time and place, shortly beforehand carried a deadly weapon to a place near by in order to have it accessible when the gathering occurred, and while it was in progress went to the place of deposit, obtained actual possession of the weapon, and carried it about his person to the gathering and into the crowd assembled, he was guilty of the offense of carrying a deadly weapon to a public gathering, as prescribed by the Penal Code, § 342.
4. The evidence warranted the verdict.

Argued July 10, — Decided August 2, 1905.

Indictment for misdemeanor. Before Judge Holden. Taliaferro superior court. June 3, 1905.

Dave Wynne was indicted for carrying about his person a shotgun to a public gathering, not at a militia muster ground. On the trial the evidence for the State was, in brief, as follows: On July 4, 1904, there was a public barbecue at Hillman, in Taliaferro county, at which negroes and some white people gathered, to the number of some four or five hundred. A difficulty occurred, and there was a good deal of rioting. Some of the crowd scattered. Several were seen with deadly weapons. Among others, the defendant had a shotgun. The evidence did not disclose just where he procured the gun but he was seen

coming with it from the direction of the house of one Terrell, some fifty or sixty yards away from where the barbecue occurred. He came down to where the crowd was, and stopped. At the time of the rioting there were some forty or fifty people present. During the day a number of women were in Terrell's yard under the shade of the trees, and they passed from the gathering to the house, back and forth. The defendant's statement was substantially as follows: He carried his gun over to Terrell's on Saturday before July fourth. He generally hunted such things as young rabbits. He set his gun down at Terrell's house Saturday evening, forgot it, and left it there. On Monday evening, the day of the gathering, he came by there and got his gun. At the time of the rioting he was not present. He had gone to the spring about a quarter of a mile distant. He came back by Terrell's house and got his gun, expecting to shoot some young rabbits on his way home. He did not know anything about the difficulty until some of them were telling him about it. He had no "forethought" at all about it, was not interested in it, and had nothing to do with it. In rebuttal the State proved that at the time the defendant came up with his gun, two or three others were also there with guns, though the general rioting had ceased a few minutes before. Two or three of these men, including the defendant, brought guns from Terrell's house. He was the second or third who did so. He was in a position where he could see those bringing guns to the difficulty.

The jury found the defendant guilty.* He moved for a new trial, which was refused, and he excepted.

Hawes Cloud, for plaintiff in error.

David W. Meadow, solicitor-general, contra.

LUMPKIN, J. (After stating the facts.) 1. One ground of the motion for a new trial complains that the court allowed a witness to testify that he thought the defendant was in a position to see whether other people brought guns from Terrell's residence; that from the position where the defendant was he could have seen this; and that other people did bring guns to the scene of the difficulty. It does not appear what ground of objection was urged to this evidence when it was introduced. It is stated in the motion for a new trial that "said question and answer are irrelevant, and said answer is purely an opinion

of the witness without having any facts upon which such opinion is based." This was the opinion of the attorney when movant's motion for a new trial was made, but whether this ground of objection was urged at the time of the trial does not appear. It can not, therefore, be considered.

2-4. The purpose of the Penal Code, § 342, is to protect the public against the danger arising from allowing persons to carry deadly weapons to courts of justice, or election grounds or precincts, or places of public worship, or any other public gathering in this State. The exception of militia muster grounds is for the purpose of allowing parades and gatherings where troops necessarily carry deadly weapons. So, also, sheriffs, constables, marshals, policemen, or other arresting officers or their posses, acting in the discharge of their official duties, and for the preservation of the public peace, are excepted from the operation of the law. The wholesome purpose of this statute would be much limited by putting a narrow construction upon the expression "any other public gathering." A barbecue on the fourth of July, at which the public is assembled in considerable numbers, constitutes a public gathering within the meaning of the statute. Reliance is placed by the defendant upon the decisions in *Modesette v. State*, 115 Ga. 582, and *Culberson v. State*, 119 Ga. 805. They hold that coming into possession of a deadly weapon while at a public gathering is not the same thing as carrying the weapon to such gathering, and will not authorize a conviction under the Penal Code, § 342. Those decisions do not control the present case. The defendant carried his gun to a house forty or fifty yards distant from the point where the barbecue was to occur, and deposited it there. During the gathering, and while the riotous conduct was prevalent, he left the gathering and went to the house, obtained the gun, and returned to the crowd. It is true that he stated that he left the gun at the house by accident, and that he obtained it for the purpose of carrying it home and shooting some young rabbits; but, in view of the coincidence of his obtaining the gun and returning to the crowd about the same time others procured guns from the same house, the jury evidently did not believe his statement. They were not bound to do so, and the evidence warranted their finding. That some of the crowd dur-

ing the day went into Terrell's yard and sat in the shade did not bring this case within the decisions above cited. We think that neither the judge nor the jury erred.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

GODWIN v. THE STATE.

CANDLER, J. 1. Where, during the argument before the jury in a criminal case, counsel for the accused started to read to the jury from a Supreme Court report of this State, and objection thereto was made by the solicitor, it was not error for the court, while allowing the extract to be read in the presence and hearing of the jury, to require that it be read "to the court."

2. The sentence to be imposed upon one convicted of crime in this State is a matter for the discretion of the trial judge, subject only to the limitations imposed by the statute regulating such crime; and no sentence is excessive, in legal contemplation, which is not greater than the maximum sentence fixed by law. It follows that a sentence of twelve months in the chain-gang, without the alternative of a fine, for carrying concealed weapons, is not excessive.

3. The evidence fully warranted the verdict.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 10, — Decided August 2, 1905.

Accusation of carrying concealed weapon. Before Judge Henderson. City court of Vienna. June 3, 1905.

Busbee & Busbee, for plaintiff in error.

E. F. Strozier, solicitor, contra.

STEED v. THE STATE.

COBB, J. 1. An assignment of error in a motion for a new trial, that "the court erred in charging the law of conspiracy in said case, there being no evidence to sustain the same," is too general and indefinite to raise any question for decision.

2. A party can not complain of the court's failure to charge upon a particular theory, when his counsel, in response to a question addressed to him by the court, stated that he did not desire an instruction on such theory. A party can not complain of an error which his own conduct has induced. *Quattlebaum v. State*, 119 Ga. 433 (2); *Harris v. State*, 120 Ga. 169; *Robinson v. State*, 120 Ga. 312 (2); *Nixon v. State*, 121 Ga. 144 (8). *Horton v. State*, 120 Ga. 307, differs from the present case and from those cited, in that the counsel merely contended to the jury that manslaughter was not involved, and did not make directly to the judge any statement which brought about the failure to charge upon the law of that offense.

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3. Failure to give an instruction on the subject of impeachment of witnesses, in the absence of a pertinent and proper request, is not cause for a new trial. *Baker v. State*, 121 Ga. 189, and cit.; *Phillips v. State*, 121 Ga. 358, and cit.; *Horton v. State*, 120 Ga. 309.
4. The alleged newly discovered evidence was impeaching in its nature, as well as cumulative; and there being some evidence to warrant the verdict, the discretion of the trial judge in overruling the motion for a new trial will not be controlled.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 10, — Decided August 2, 1905.

Indictment for assault with intent to murder. Before Judge Freeman. Carroll superior court. June 8, 1905.

Hamrick & Smith, for plaintiff in error.

J. R. Terrell, solicitor-general, contra.

GROVES v. THE STATE.

- CANDLER, J. 1. On the trial of an indictment for keeping a gaming-house, it is not error, where such a charge is warranted either by the evidence or the statement of the accused, to instruct the jury that if the accused loaned money to another person for the purpose of maintaining a gaming-house, and after the loan was made the accused visited the gaming-house and "did anything towards keeping and maintaining such house and room so kept and maintained . . . for the purpose of gaming, he [the accused] would be equally guilty with [the person to whom the money was loaned], inasmuch as keeping and maintaining a gaming-house in Georgia is a misdemeanor, and all persons concerned in such keeping and maintaining are principals."
2. Where the indictment contained a count charging the accused with gaming, it was not error to charge that "it is not essential to the State's case for the State to prove that he both played and bet for money; — if he played or bet for money contrary to the laws of the State, as contained in the bill of indictment, the State would be authorized to demand at your hands a verdict of guilty." Stripped of all confusion, this was equivalent to charging that one may be guilty of gaming if he bet on the result of a game, though he be not a player; and this is a sound principle of law. *Parmer v. State*, 91 Ga. 152.
 3. Evidence that the accused played games of chance for money in a gaming-room, that on stated occasions he "presided over a crap-table" in the room; and that when visitors applied for admission to the room they were admitted sometimes by the accused and sometimes by another person who seemed to be equal with him in authority over the room, coupled with an admission by the accused that he had loaned a sum of money to this other person for the purpose of operating a gambling-room and that he frequently visited the room in order to "look after his money," was sufficient to authorize a general verdict of guilty on an indictment containing three counts, viz., keeping a gaming-house, keeping a gaming-table, and gaming.

4. The exceptions to specified portions of the charge of the court on the ground that they were not warranted by the evidence are without merit.
Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 10, — Decided August 2, 1905.

Indictment for keeping gaming-house. Before Judge Hodges.
City court of Macon. June 3, 1905.

John R. Cooper, for plaintiff in error.

William Brunson, solicitor-general, contra.

NAPPER v. THE STATE.

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1. In a case where if death had ensued the defendant would not have been guilty of murder, he could not be convicted of assault with intent to murder; but if the evidence warrants a conviction of the offense of stabbing not in his own defense or under circumstances of justification, he may be found guilty of that offense.
2. While in the present case the defendant was entitled to have this legal principle given in charge to the jury upon proper request, yet, where the entire charge shows that, though the request was not given in the language in which it was made, it was fully covered in the general charge, and the defendant had the benefit of the legal principle, a reversal will not result from the refusal to charge in the language of the request.
3. The charges complained of, when viewed in the light of the entire charge and of the evidence, furnish no ground for a reversal.
4. The verdict was not contrary to law or the evidence.

Submitted July 10, — Decided August 2, 1905.

Indictment for assault with intent to murder. Before Judge Felton. Bibb superior court. June 2, 1905.

Frank Napper was indicted for an assault with intent to murder. He was convicted, moved for a new trial, and upon the overruling of the motion excepted. The evidence on behalf of the State was, in brief, as follows: On April 16, 1905, a baptizing occurred at which a large number of negroes congregated. There was a pond on land leased by T. C. Barlow and his brother J. E. Barlow. They gave permission for the baptizing to take place there, provided the people would not go on the cultivated land. Napper and one Garden left the pond and crossed over a piece of land into the watermelon patch, pulled out a bottle of whisky, took a drink, and urinated in front of the house where T. C. Barlow's mother was, though it does not appear that she saw them.

In crossing the land they trampled upon some corn which was planted, and as they went back the two Barlows met them. J. E. Barlow asked defendant if he did not know that it was against their rules to go over the land, and he said, "No." The two were standing there arguing, and Barlow told the defendant that he did not allow any one to go there. Defendant raised his hand for something, and Barlow struck his hand and knocked it "back down," saying, "Don't raise your hand at me." Another negro named Mitchell, who was in a hack, jumped out, carrying the butt end of a whip, and saying, "Kill the damn son of a bitch. Let them go to their house and get their guns. We have got as many as anybody." J. E. Barlow started toward the house. The defendant cut T. C. Barlow with a knife, a weapon likely to produce death, the wound being very severe, causing insensibility for sometime, and causing Barlow to be confined to his bed from the injury. When the defendant raised his hand Barlow "slapped it back down." Barlow's fist was not doubled up, but his hand was open. He did not strike the defendant. J. E. Barlow testified for the State: "What caused my brother to strike the negro on the hand, I suppose the negro was raising his hand to hit him. The negro raised his hand and he put it back down, then Hamless [Mitchell] jumped out of the hack and says, 'Kill him, a damn son of a bitch.'" After the cutting the defendant and Mitchell ran away, and were afterwards caught. The evidence for the defendant was, in brief, as follows: When Barlow went up to the defendant he slapped the defendant, and when the latter stepped back he was again slapped. Barlow then kicked him. It was after being attacked, struck in the face, and kicked, that the defendant cut Barlow.

John R. Cooper, for plaintiff in error.

William Brunson, solicitor-general, contra.

LUMPKIN, J. (After stating the facts.) 1, 2. Under the decisions of this court it is well-settled law that in a case where, if death had ensued, the defendant would not have been guilty of murder, but only of manslaughter, he could not be convicted of an assault with intent to murder, though he might be guilty of the offense of stabbing not in his own defense or under circumstances of justification. *Elliott v. State*, 46 Ga. 159; *Seborn v. State*, 51

Ga. 164; *Smith v. State*, 52 *Ga.* 88. On the other hand, it would have been error to charge that if the defendant cut Barlow with a weapon likely to produce death, under such circumstances as would have made him guilty of murder had death ensued, he would have been guilty of the offense of assault with intent to murder. *Gilbert v. State*, 90 *Ga.* 691; *Gallery v. State*, 92 *Ga.* 463; *Lanier v. State*, 106 *Ga.* 368. At first view there may appear to be some inconsistency in these two statements, but the conflict is only apparent and not real. The reason which underlies both rulings shows them to be entirely consistent. On the trial of one accused of an assault with intent to murder, the intent to kill is an essential element of the offense. If one actually kills another with a weapon likely to produce death, and used in a manner calculated to produce that result, the law presumes an intention to kill from the fact of the killing. Thus it has been held, that "Where one voluntarily fires a loaded pistol at another, without excuse and not under circumstances of justification, and kills the person at whom he shot, the law will hold the slayer responsible for the consequences of his act. It conclusively presumes malice on the part of the slayer; and the grade of the homicide, so committed, will not be reduced to involuntary manslaughter, even if the intent of the slayer, under such circumstances, was to wound or cripple the deceased, and not to kill." *Stovall v. State*, 106 *Ga.* 443 (3). The law will charge an evil-doer with all the natural consequences of his unlawful act, which the act produces. But it will not necessarily impute to him by presumption an intention to produce a consequence which did not result. Therefore, where death does not result, the intent to kill is not matter of legal presumption, but is a matter to be found by the jury. In determining this they may infer malice from the facts proved. *Gilbert v. State*, *supra*. The unlawful intent to kill being an essential ingredient of the crime of assault with intent to murder, that offense includes all the elements of murder except the actual killing. But inasmuch as from an actual killing the intent to kill may be presumed, it does not follow that in the absence of a killing the presumption arises.

In the present case the defendant requested the following charge: "If you believe that the defendant under the circumstances proven had killed Barlow and he would not have been

guilty of murder, then I charge you that you are not authorized to convict the defendant of the offense of assault with intent to murder." This request contained substantially the legal proposition stated in this opinion. Had it not been in effect covered by the charge given, its refusal would furnish ground for a new trial. But a careful examination of the entire charge satisfies us that it substantially covered the principle included in the request. The presiding judge defined the offense of assault with intent to murder to be "an assault with a weapon likely to produce death, with intent unlawfully, wilfully, feloniously, and of malice aforethought to kill and murder." In reference to malice as applied to the case on trial, he informed the jury that it meant "the intent to take human life unlawfully, where there are no circumstances of justification or mitigation for the act if the life should be taken as intended; it means the deliberate and intentional use of a deadly weapon for the purpose of taking human life, from whatever motive it springs, if there are no circumstances surrounding the transaction which mitigate or justify the act." He informed them that "whether there was the intent to kill and murder is a question of fact which the jury should determine by looking to all the facts and circumstances in the case, looking to the parties, the manner of the use of the weapon, if one is used, the circumstances attending its use, all the light you can get on the transaction for the purpose of determining the great question involved in the case, which is, is the defendant guilty of assault with intent to murder?" He charged them as to what would reduce a homicide from murder to manslaughter. In stating the things necessary to be proved, to warrant the conviction of the accused of assault with intent to murder, he said: "And that there were no circumstances at the time which either justified Napper in so cutting Barlow, or which had the effect of showing that he acted in a sudden heat of passion brought about in such a manner as to in any degree mitigate the result of the defendant's act." He explained to the jury the difference between the offense of assault with intent to murder and the offense of stabbing another not in one's own defense or under other circumstances of justification. At another time he said "that the offense of assault with intent to murder is based upon facts

which require as an essential, to be shown upon the part of the State, that the defendant acted without justification or mitigation in so acting and using a weapon likely to produce death and with an intent to take human life." From these quotations it will be seen that the charge was fully as favorable to the defendant as he was entitled to ask; and while the court did not give the request in the language asked, the charge did cover the substantial principle involved in it. In the light of the whole charge as contained in the record, the refusal of the request furnishes no ground for reversal.

3. The other charges complained of, when viewed in the light of the entire charge and of the evidence, furnish no ground for a reversal.

4. The verdict was not contrary to law or the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

NELMS v. THE STATE.

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There was no error in charging, or in failing or refusing to charge. The court did not express or intimate an opinion as to what had or had not been proved. There was ample evidence to authorize the verdict, and there was no abuse of discretion in refusing a new trial.

Argued July 10, — Decided August 2, 1905.

Conviction of manslaughter. Before Judge Littlejohn. Webster superior court. May 27, 1905.

G. P. Munro, J. J. Dunham, and S. R. Stevens, for plaintiff in error. F. A. Hooper, solicitor-general, contra.

FISH, P. J. John Nelms, under indictment for murder, was found guilty of voluntary manslaughter. His motion for a new trial being overruled, he excepted.

1. Neither the evidence nor the prisoner's statement authorized a charge on the subject of involuntary manslaughter. Therefore the failure to instruct the jury on that subject was not error.

2. It was not cause for a new trial that the judge, before instructing the jury on the subject of flight, remarked in their presence, "Now one matter that my attention has been called to by the solicitor, that I overlooked in charging you." Such remark

did not tend to unduly emphasize the instructions on the subject of flight.

3. After charging the rule as to positive and negative testimony, it was not error for the court to instruct the jury that "the rule does not apply when two parties having equal facilities for seeing or hearing, if one swears that it did occur and the other that it did not." Civil Code, § 5165.

4. Error was assigned, in the motion for new trial, upon the refusal of a written request to give in charge the following: "The good character of one on trial for a crime, if satisfactorily proved, may of itself, in a case where guilt is not plainly established, be sufficient to generate in the minds of the jury a reasonable doubt of his guilt." And complaint was also made that the court instructed the jury that where good character of the accused is shown, such character may of itself "generate a doubt in the minds of the jury as to guilt of the accused. But while that is true, if the jury should be satisfied from the testimony, beyond a reasonable doubt, of the guilt of the accused," then the jury would be authorized to convict notwithstanding such proof of good character. The error assigned upon the charge was "that the court instructed the jury that good character might raise in their minds simply a doubt of the movant's guilt, and not a reasonable doubt which would authorize them, on proof of good character alone, to find movant not guilty." If there were any evidence tending to show the general character of the accused, it was the testimony of a witness who swore: "I have known John ever since he was a boy — nothing likè grown. I know his general character pretty well. It is about as good as any negro I have ever known or had about me." For myself, I think it exceedingly doubtful if this evidence authorized a charge on the subject of the general good character of the accused. The legal signification of general character or reputation is not readily understood by laymen of average intelligence; and the testimony above quoted indicates to my mind that the witness was merely giving his individual opinion of the character of the accused, based upon his knowledge and acquaintance with him, and not the "community-reputation" of the accused. Moreover the witness did not swear to a positive knowledge of the general character of the accused. He said he knew it "pretty well." Nor did he state unqualifiedly that the general

character of the accused was good, but said that it was "about as good as any negro I have ever known or had about me." This may have been absolutely true, and yet the general character of the accused may not have been good. The adverb "pretty" means "in some degree; moderately; considerably; rather; . . . less emphatic than *very*; as, I am pretty sure of the fact." Webster's Dictionary. One of the meanings of the adverb "about" is "nearly; approximately; with close correspondence in quality; . . . degree; etc. Ib. So the testimony of the witness may be thus paraphrased: "I know the general character of the accused moderately or rather well. It is nearly or approximately as good as that of any negro I have ever known or had about me." Granting, however, that the testimony above referred to authorized an instruction as to the general character of the accused, we are of the opinion that the charge given by the court was substantially correct. See *Thornton v. State*, 107 Ga. 683, and cit. In *Stevenson v. State*, 83 Ga. 575, it was held that a charge as to good character of the accused, in its relation to reasonable doubt, less accurate than the charge on that subject in the present case, did not require a new trial. We are further of the opinion that the instructions sufficiently covered the request to charge. The charge could not have misled the jury into believing that the court meant that proof of good character of the accused would generate a mere doubt of his guilt which would not authorize his acquittal.

5. The court charged the jury that where the accused offers evidence for the purpose of establishing his character for peace, the jury should consider such evidence "in connection with the other testimony in the case, in passing upon the guilt or innocence of the defendant." Error was assigned upon this charge, because the court instructed the jury to consider the evidence of the character of the accused for peace in connection with the other evidence in the case, "and failed to instruct them that said testimony could be considered independent of the other testimony as to the question of movant's guilt or innocence, or as generating a reasonable doubt in the mind of the jury as to the movant's guilt or innocence." The charge as given was correct. Proof that the accused bore a good character for peaceableness should have been considered by the jury, not by itself alone, but in con-

nection with all other pertinent evidence tending to establish his guilt or innocence. See *Brazil v. State*, 117 Ga. 32. As has been frequently ruled, an instruction correct in itself is not rendered erroneous by a failure to charge some other appropriate instruction.

6. Nor did the court err in refusing a written request to give a charge defining a reasonable doubt as "such a doubt as a juror would hesitate to act on in the most important business affairs of his own in the ordinary walks of life." It is stated in 23 Am. & Eng. Enc. L. 955, that "there have been many attempts to define and interpret the term 'reasonable doubt,' . . . but it is apprehended that such attempts are futile; that the words are of plain and unmistakable meaning; and that any definition on the part of the court tends only to confuse the jury and to render uncertain an expression which, standing alone, is certain and intelligible." In *Battle v. State*, 103 Ga. 53, Mr. Justice Little, after citing a number of cases, says: "It would seem, therefore, to be a conclusion that the phrase 'reasonable doubt' explains itself. Certainly the meaning is obvious, and will be readily appreciated by the average juror without further explanation." The definition given in the request above quoted was certainly not accurate, as it leaves the jury to infer that any doubt which might cause any juror to hesitate to act in the most important business affairs of his own would be such a doubt as would justify the acquittal of the accused. The request, if given, would have tended only to confuse the jury and to make the term "reasonable doubt" uncertain and less intelligible. The court, in its charge, several times instructed the jury that before they would be authorized to convict the accused, the evidence must satisfy their minds and consciences beyond all reasonable doubt of his guilt.

7. Complaint was made that the judge erred in remarking, in the presence of the jury and during the examination of a witness by counsel for the accused: "I do not think there is any issue raised in the case, whether he [meaning the defendant, John Nelms] shot at William Dorsey again, on either the part of the State or the defendant's witnesses. I haven't heard any testimony on the question; it's taking up time on a question that is not in the case; if it is in issue, it has not developed so far; the State's

witnesses said that John did not shoot but once." The error assigned was that the court, in such remark, expressed an opinion, in the presence of the jury, as to what or what had not been proved in the case. It is obvious that there is no merit in this assignment of error.

8. The court did not err in ruling out, at the instance of the solicitor-general, evidence of the self-serving declaration of the accused, though it was given in evidence by a witness while being examined by the solicitor. Considering the evidence and the statement of the accused, the jury were authorized to render one of three verdicts: for murder, for voluntary manslaughter, or not guilty; and the court did not err in so instructing them. The evidence authorized the verdict, and the court did not err in refusing to grant a trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

WHIPPLE v. THE STATE.

The evidence for the State was entirely circumstantial, but, if the witnesses were credible, it was sufficient to establish the guilt of the accused beyond a reasonable doubt. The credibility of the witnesses was a matter for the jury, subject to the revision of the judge upon application for a new trial. The trial judge being satisfied with the verdict, and there being no error of law requiring the granting of a new trial, his discretion exercised in refusing to grant a new trial will not be interfered with.

Argued July 10, — Decided August 2, 1905.

Indictment for murder. Before Judge Martin. Pulaski superior court. June 13, 1905.

Whipple was tried for the murder of Boone, convicted, and sentenced to imprisonment for life. He filed a motion for a new trial, which was overruled, and he excepted. Besides the general grounds, the motion contained two special grounds. The first complained that the court refused to rule out the testimony of a witness, to the effect that on the morning after the killing she saw one of the sons of the accused put a pair of shoes over the door of the house of the accused. The objection to the testimony was that it was irrelevant, that there was nothing to connect the accused with the act of the son, and that it did not appear that the

shoes belonged to the accused. The judge allowed the testimony to remain in solely for the purpose of impeaching the son of the accused, who had previously testified that he did not put the shoes over the door. The second special ground complained that the court refused to allow the accused to ask Davis, a witness for the State, if he did not tell Simmons that if he came to the trial and testified like he did on the preliminary trial, it "would put the guilt on him," counsel stating that he expected to show that Simmons was kept away by this threat. On objection by the solicitor-general, the judge said that the testimony seemed to be inadmissible, but he would not then make a final ruling but would allow the solicitor-general to call the witness as a State's witness after dinner. The evidence was not afterwards offered, nor was the court again requested to allow it admitted, nor was any further ruling made.

W. L. & Warren Grice and Fort & Grice, for plaintiff in error.

John C. Hart, attorney-general, and *E. D. Graham*, solicitor-general, contra.

COBB, J. The evidence upon which the State relied for a conviction was entirely circumstantial in its nature. It consisted of testimony as to tracks, threats, and efforts to fabricate evidence favorable to the theory of the defense set up by the accused. The motive for the homicide was claimed to have arisen from the fact that the deceased was in the habit of visiting the house at which the wife of the accused was accustomed to stay, the accused and his wife being at the time in a state of separation. If the witnesses called by the State were credible, the circumstances proved were sufficient to establish the guilt of the accused. On the other hand, there were witnesses called by the accused whose testimony, if worthy of credit, established a complete defense. According to the testimony of one witness it was impossible for the accused to have been at the scene of the homicide at the time of its commission; and there was other testimony tending to establish the alibi set up. The credibility of the witnesses was a question for the jury; and the judge being satisfied with their finding, under the well-established rule this court will not interfere with his judgment refusing a new trial, unless some material or substantial error was committed during the progress of the trial.

Only two errors of law were complained of. The accused can not take advantage of the refusal to admit the testimony of the witness Davis, for the reason that the court made no positive ruling on this subject, but postponed the ruling until a later stage of the case, and the attention of the court was not thereafter called to the matter. See *Stone v. State*, 118 Ga. 705 (9). The evidence as to the concealment of the shoes by the son of the accused was restricted to the purpose of impeachment. While this might be treated as immaterial, and therefore the evidence would not be admissible, still we do not think the admission of the testimony was an error of such a character as to probably affect the result, and a reversal is not required on that ground. In fact the venerable and able counsel for the plaintiff in error, who argued the case here with so much earnestness, candidly admitted that there was nothing in either of the special grounds which would require a reversal of the judgment; and we concur with him in this view. He asked a reversal upon the general aspect of the case, as being one founded mainly upon the testimony of a witness who was old, infirm, superstitious, and shown to be unworthy of belief. This witness was impeached by proof of general bad character, but she was also sustained by evidence of good character. All of these questions were, however, for the jury, and we do not feel justified in interfering with the judgment refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

MIXON v. THE STATE—two cases.

123 581
125 740

1. It furnished no ground for a motion for a new trial to allege that the sentence imposed by the court upon a person convicted of a criminal offense was excessive.
2. A headnote to a decision in this court, which declares that under the facts of a case then under consideration, as therein stated, it was error to give to the jury a certain charge, is not an appropriate form to be given in charge to the jury in another case; and a request for that purpose was properly refused.
3. Two cases having been heard in this court together, the evidence in the first case (*Robert Mixon v. State*) was sufficient to support the verdict.
4. The distinction between justifiable and excusable homicide has been abolished in this State. Every homicide which is without guilt is now class-

- fied as justifiable. On a trial based on an indictment for assault with intent to murder, therefore, there was no error in refusing to give in charge a request that "If the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable."
5. The statement, that "It is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person," is not a proper rule to be given in charge to the jury, and a request embodying such principle should be refused.
 6. Where the general character of a person accused of a crime was not attacked or put in issue, there was no error in refusing to charge that the character of the accused is presumed to be good unless shown to be otherwise by the evidence.
 7. Where two persons were jointly indicted as principals for the offense of assault with intent to murder, and were tried separately, and where on the trial of the second defendant evidence was introduced on behalf of the State showing that the other had been convicted, the court should have charged, on request, that the conviction of one of those jointly accused created no presumption of guilt as to the other.

Argued July 10, — Decided August 2, 1905.

Indictment for assault with intent to murder. Before Judge Hammond. Richmond superior court. May 26, 1905.

Robert Mixon and Andrew Mixon were jointly indicted for an assault with intent to murder, alleged to have been committed upon one Billy Williams, by shooting him with a musket. They were tried separately, Robert being first tried. Each of them was convicted, each moved for a new trial, and upon its refusal each excepted. The two cases were argued together in this court. The evidence on behalf of the State was substantially the same in each case, and was in brief as follows: Williams went to the house of one Hattie Jenkins. While he was there the two defendants came up. Another man who was there with a bicycle desired to leave, and asked Andrew Mixon, who was sitting in the door, to get up and let him out. Williams said, "Yes, get up and let him get his wheel out." Mixon replied in the most profane language, cursing Williams, and said: "You think, 'cause you got your pistol sticking up there, somebody's afraid of you." Williams in fact had a pistol in the upper pocket of his coat, which he was carrying to another person. After making this statement Andrew Mixon ran to his own home, which was not far away, and his brother Robert followed him. Williams then left the house. Shortly afterwards the two Mixons returned with a gun, inquired for Williams, and, on learning that he had left, followed him. On overtaking him Robert Mixon had the gun.

Williams inquired what he was going to do, to which he replied, with an oath and a vile epithet, that he was going to kill Williams. The latter inquired, for what; to which Mixon answered, "Because you tried to hurt my brother." Williams denied this. About that time Andrew Mixon came up with a stick. Williams grabbed the gun, and asked Robert Mixon not to shoot him. Andrew struck him over the head; he staggered and turned loose the gun; whereupon Robert Mixon shot him. He denied having made any threats or having taken his pistol out of his pocket. A witness also testified that when the two Mixons went to the Jenkins house looking for Williams, Robert stated that he intended to kill him that night; that shortly after they left, a gun was fired, and after a time Andrew came back to the house and stated that they could come down and get Williams, and that Robert had killed him. In Andrew's case a bailiff testified that Robert had first been convicted of doing the shooting, but that during his trial Andrew had confessed that he shot Williams with the gun.

Henry S. Jones, for plaintiffs in error.

J. S. Reynolds, solicitor-general, by *John M. Graham*, contra.

LUMPKIN, J. (After stating the facts.) 1. In the case of Robert Mixon one ground of the motion for a new trial was, that, in view of the recommendation of the jury, the sentence of five years in the penitentiary was excessive. This is not a proper matter for a motion for a new trial.

2. Another ground was that the court refused a request to give in charge the following: "It is not necessary, however, that it appear that it was absolutely necessary to make the assault in order to save life. Therefore when, in a trial for assault with intent to murder, the accused sets up the defense that he inflicted the wounds on the prosecutor to prevent the commission of a felony on his person, and the evidence both of the State and the accused is directed to the truth of the issue thus made, it is error to charge the jury, in effect, that, in order for the accused to be justified it must appear that the danger was so urgent and pressing at the time of the difficulty that in order to save his own life it was absolutely necessary to kill." With the exception of the first sentence, this request is a literal copy of the third headnote in the case of *Heard v. State*, 114 Ga. 90. We of course hold that headnote to

be sound law; but it contains a ruling of this court as to what was an erroneous charge given in the case then under consideration. It is evident that the court in the present case was not called on to inform the jury that a certain charge was error.

3. The evidence was amply sufficient to support the verdict, and there was no error in overruling the motion for a new trial in the first case.

4. In the case of Andrew Mixon error is assigned because the court refused a written request to give in charge the following: "If the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable." Under the law of this State the distinction between excusable homicide and justifiable homicide has been abolished. Penal Code, § 70. Every homicide which is without guilt is now classified as justifiable. The use of the word "excusable" in connection with a charge in regard to homicide is therefore inapt in this State, and might tend to cause the jury to believe that a homicide, although not justifiable, was yet excusable. Under the common law this would have been different. The request, in the shape in which it was made, was properly refused.

5. The court was requested to give the following charge: "It is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person." The refusal to do so was assigned as error. The request contains an abstract statement slightly modified from the usual expression that "it is better that ninety-nine guilty men should escape than that one innocent person should suffer." See *Boon v. State*, 1 Ga. 621. Whether or not this is a sound maxim in morals or sociology, it is not a rule of law suitable to be given in charge by a presiding judge to a jury. We have it on tradition that in the early history of the State a request of this character was made, and the judge of the trial court gave it in charge, but added that in his opinion the ninety-nine guilty men had already escaped.

6. Where the general character of the accused was not attacked or put in issue, there was no error in refusing to charge that the character of the accused is presumed to be good unless shown to be otherwise by the evidence.

7. Some of the other requests to charge were covered by the

general charge. Only one other need be specially noticed. The court refused to charge, on request, that "Where several are jointly indicted, the conviction of one creates no presumption of guilt as to any of the others." The two defendants were jointly indicted in this case. Robert Mixon was first tried and convicted. If this fact had not appeared or been placed before the jury, it would have been unnecessary to have given any charge on the subject. Nor is it quite clear why counsel for the State saw fit to prove by a witness that Robert had been convicted. As he did so, however, and the two were jointly indicted as principals, and the evidence for the State sought to show that the two were acting in conjunction, the court, on request, should have informed the jury that the conviction of Robert raised no presumption of guilt against Andrew. See *Coxwell v. State*, 66 Ga. 309 (3), 315.

In the case of Robert Mixon the judgment is *affirmed*; in the case of Andrew Mixon the judgment is *reversed*.

All the Justices concur, except Simmons, C. J., absent.

GLENN v. THE STATE.

The evidence being insufficient to support the verdict, the trial judge erred in not granting a new trial.

Submitted July 10, — Decided August 2, 1905.

Accusation of misdemeanor. Before Judge Humphreys. City court of Moultrie. June 14, 1905.

J. D. McKenzie and *J. A. Wilkes*, for plaintiff in error.

T. W. Mattox, solicitor, and *L. T. Johnson*, and *James Humphreys*, contra.

FISH, P. J. The accused was tried and convicted, in the city court of Moultrie, upon an accusation charging him with a violation of the statute of August 15, 1903, which is entitled, "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services, with intent to defraud; and to fix the punishment therefor, and for other purposes." The accusation charged that he contracted with the firm of Pinson & Woolard, a firm composed of T. J. Pinson and H. D. Woolard, to perform services as a laborer for said firm, and by

123	585
124	28
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reason of such contract did obtain advances from the firm in the sum of \$103 in money, and, after having so contracted and procured said money, did fail to comply with said contract or to return to Pinson & Woolard such money with interest, to the loss and damage of Pinson & Woolard in the sum of \$103, the contract having been made by the accused with intent then and there to procure such money from Pinson & Woolard and not comply with said contract. He made a motion for a new trial, upon the general grounds and others, which was overruled, and he accepted.

In our opinion, the trial judge erred in overruling the motion, as the evidence was not sufficient to authorize a conviction. The accused was convicted upon the testimony of H. D. Woolard, who testified that he was a member of the firm of Pinson & Woolard, and, acting for such firm, had purchased certain property, which it appears from his evidence was a turpentine farm, from a man named Parrish. Woolard testified: "At the time I looked over the property I found that a number of Mr. Parrish's hands were in debt to Parrish, and I went and saw each hand before I would buy out the still, boxes, timber, etc. The defendant in this case owed Mr. Parrish an account of \$89.00, and he wanted me to pay Mr. Parrish for him, and he contracted with my firm, Pinson & Woolard, to work for us if we would pay the account to Mr. Parrish; but we would not agree to do that until we saw the hands each individually about his account, and then we bought out Mr. Parrish, after the hands had agreed to work out their accounts with us. I specially remember going to Archie Glenn, the defendant in this case, and having a talk with him about his account, which was eighty-nine dollars and some cents. The defendant said he would work it out with our firm if I paid the account to Mr. Parrish; and I thereupon paid the account to Mr. Parrish of eighty-nine dollars and some cents, and the defendant went to work for us as a wagoner at and for the sum of twenty dollars per month. I am not positive when he went to work, but I made this trade some time the early part of November last, and to the best of my recollection the defendant went to work for us some time in November last, about the 10th day of November, and continued to work for us up to the second day of May, 1905." The witness further testified that the accused, at different

times, while he was working for Pinson & Woolard, got different amounts of money from such firm, and that when he left the employment of such firm he owed it the sum of \$103, and had "since then failed and refused to return and carry out contract or to return to us said advances with interest;" and that the \$103 that the accused still owed Pinson & Woolard "was obtained from us all along at different times under contract to work with us as a laborer." As we have said, this evidence was not sufficient to authorize a conviction. The statute in question, being criminal, must be strictly construed. The first section of the act provides, that "if any person shall contract with another to perform for him services of any kind with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as prescribed in section 1039 of the Code." The second section provides, "That satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced, with interest thereon, at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section." Acts 1903, p. 90.

Before one can be lawfully convicted of a violation of this statute, several things, essential to constitute the offense defined, must be shown. Among them is, that there was a distinct and definite contract for service; and another is, that the person contracting to perform this service has, without good and sufficient cause, failed and refused to carry out his contract by performing the service. An implied contract will not do, but there must be an express contract, clear and definite in its terms. The only contract between Pinson & Woolard and the accused which the evidence discloses is, that Pinson & Woolard were to pay for the accused a debt of eighty-nine dollars and some cents which he owed to Parrish, and the accused was to work for Pinson & Woolard, at and for twenty dollars per month, until he worked

out this debt. He did not contract with them that he would work for them at twenty dollars per month until he worked out this debt and in addition thereto whatever other advances they might make to him in the future. Whether a contract so indefinite and uncertain as to its duration would fall within the provisions of this criminal statute is a question which does not arise in this case. The only contract disclosed by the evidence being one by which the accused agreed to work for the prosecutor's firm at twenty dollars per month, until he worked out the sum of eighty-nine dollars and some cents, which he, upon the faith of this agreement, procured them to pay for him, and the evidence showing that he remained in the service of such firm much longer than was necessary to comply with this contract, his conviction can not be sustained. He did not violate *this* contract when he quit the service of Pinson & Woolard at the time he did. Although Pinson & Woolard let the accused have various sums of money during the time that he was working for them, and he failed to pay the debts thus created, this did not authorize his conviction. The theory that he procured these advances with intent not to perform the services covered by the only contract which was proved is utterly untenable, as the evidence shows that he did perform such services. Of course, the mere statement of the witness Woolard, that the \$103 which the accused still owed Pinson & Woolard "was obtained from us all along at different times under contract to work with us as a laborer," amounted to no more than a statement of his own conclusion, as his evidence disclosed no contract except the one above indicated.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

PERKINS v. THE STATE.

COBB, J. 1. The evidence was of such a character as to authorize an instruction on the law relating to the statutory offense of "shooting at another." *Harris v. State*, 120 Ga. 167.

2. The charges complained of were not erroneous for any of the reasons assigned. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 10, — Decided August 2, 1905.

Conviction of shooting at another. Before Judge Littlejohn. Stewart superior court. May 24, 1905.

R. S. Wimberly, for plaintiff in error.

F. A. Hooper, solicitor-general, contra.

SHEFTALL *v.* CENTRAL OF GEORGIA RAILWAY CO.

123	589
129	409

1. One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights or those of another, provided the publication be not unnecessarily made to others than to those who the publisher honestly believes are concerned in the subject-matter of the publication.
2. The statement must be no broader and the publication no wider than the interest to be subserved demands. Care must be taken, not only to keep the statement within proper limits as to its subject-matter, but also that it be not made to those who are wholly without interest in the matter.
3. "Where the expressions employed are allowable in all respects, the manner of the publication may take them out of the privilege."
4. Mere publication to a stranger will not always destroy the privilege, if it appears that the communication, prima facie privileged, was made in the hearing of third persons not legally interested, and whose presence was merely casual and not sought by the publisher.
5. To make the defense of privilege complete, in an action of slander or libel, good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must all appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying on the privilege.
6. When a railway company discharges a conductor, and it comes to its knowledge that there are still in his possession tickets of the company which were delivered to him while in its employment, which he at that time had a right to sell, and which he refuses or fails to surrender, the company has a right, in order to protect its own interest, to take such precautions as are reasonably necessary to prevent the use of the tickets by persons not entitled to use them.
7. A publication by a railway company under such circumstances to persons whose knowledge is necessary to its protection is authorized.
8. The publication, however, if couched in terms which would be per se libelous, or libelous if published under circumstances which would make it of such character, would not be privileged, if it was communicated to persons not concerned with the matter of the outstanding tickets, whether such persons be strangers or other employees of the company.
9. The charge of the judge did not distinctly submit to the jury the controlling issue in the case, as to whether the publication was unnecessarily made to others than those concerned in the matter of preventing the use of the unsurrendered tickets.

10. Whether the writing was a libel under the circumstances under which it was published was to be determined by the jury, after taking into consideration the terms of the writing, the circumstances of the publication, their knowledge of the meaning of the words employed, and the impression the use of such words under such circumstances would make upon the mind of a person of average intelligence; and it was not incumbent upon the plaintiff to prove by witnesses what they understood the writing to mean.
11. The rulings upon evidence were free from error.

Argued June 29, — Decided August 2, — Rehearing denied August 5, 1905.

Action of libel. Before Judge Hodges. City court of Macon. November 29, 1904.

Sheftall brought his action against the railway company for libel. The petition alleged, in substance, as follows: On November 9, 1902, the plaintiff was discharged from the service of the defendant as a passenger conductor, because of a mistake as to an order. His application for reinstatement was pending until January 3, 1903, when it was finally refused. When the plaintiff was discharged he had in his possession certain mileage and exchange tickets and sleeping-car and parlor-car tickets which were unused and were good for use over defendant's line of railway, and which had been given the plaintiff as a part of a conductor's equipment. The plaintiff was ready at any time to turn over all of these tickets to the defendant, and defendant knew that fact, but failed to call upon him for them. On the contrary, during all of the period from his discharge until his application for reinstatement was refused plaintiff was led to believe that he would be reinstated. Notwithstanding this, the defendant maliciously, and with the intent to injure the plaintiff's good name, credit, peace, and happiness, and to expose him to public hatred, contempt, and ridicule, did compose and publish, by and through certain named officials, a false, scandalous, malicious, and defamatory circular, of which the following is a copy:

"Central of Georgia Railway Company. Passenger Department. Circular No. 3737. File No. — X. 6111.

"Savannah, December 31st, 1902.

"All Passenger Conductors.

BULLETIN.

"Tickets lost and scalped:— Mileage Exchange Tickets Form M. E. T. Nos. A-4630 to 4649 inclusive, also Parlor and Sleeping-car tickets, Form S. C. Nos. T-6110 to 6199 inclusive.

"Mr. W. C. Sheftall, formerly employed by this company as conductor on the second division, upon leaving the service of the company failed to surrender: [here follows a description of the tickets described above.] If any of the tickets described above are presented for transportation, you must decline to honor them; if possible, lift tickets and send them to General Passenger Agent, with full particulars. Conductors of trains upon which sleeping-cars are operated will please instruct porters fully in regard to the outstanding sleeping-car tickets.

"W. A. Winburn, V. P. & T. M. J. C. Haile, G. P. A. F. J. Robinson, A. G. P. A."

Copies of this bulletin were sent to many of the passenger conductors of the defendant, about forty-five in number, and to some of its division superintendents in the county of Bibb and to five or more conductors within that county. The circular was also posted by the defendant on what is known as its bulletin boards in its offices in the cities of Macon, Atlanta, Savannah, and at other places where the defendant does business, and was allowed to remain in a public and conspicuous place for a period of ten or more days. All employees of the defendant were required to examine this bulletin, and the office in which it was placed was open to and frequented by the public. In this manner the libelous matter was published where it was read by divers other persons besides the officers and employees of the defendant. Plaintiff is the Sheftall referred to in the bulletin, and the defendant intended thereby to charge him with having unlawfully disposed of the tickets referred to and appropriated the proceeds to his own use, and with being a dishonest person defrauding the defendant by unlawfully selling its property which had been entrusted to his care, and the language of the bulletin was in effect a statement and intimation that the tickets had been unlawfully and fraudulently disposed of by the plaintiff, and was in effect a charge that he had been guilty of the crime of embezzlement or larceny after trust. The defendant filed an answer, in which it admitted that the circular was prepared by its officers and agents, but denied that it was published maliciously, or with any purpose to injure or defame the plaintiff, and also denied that it was published to the general public; and specially pleaded that the preparation of the bulletin and placing it in the hands of its pas-

senger conductors was a communication which is privileged under the law, it being made by parties interested in a business, and pertaining to a matter connected with their interest, and being made, with the bona fide intent to protect the company's interest, to persons interested in the same business, and without any malice either in its preparation or the manner of its publication. The jury returned a verdict for the defendant, and the plaintiff complains of the overruling of his motion for a new trial.

Marion W. Harris, John R. Cooper, Joseph H. Hall, and Claud Estes, for plaintiff.

Hall & Wimberly and J. E. Hall, for defendant.

COBB, J. 1-5. Statements made with the bona fide intent, on the part of the person making them, to protect his own interest in a matter where it is concerned are under the law privileged communications. Civil Code, § 3840. The privilege thus given by the law must not be used as a cloak for venting malice; and if the statement is not made in good faith, in promotion of the object for which the privilege is granted, the party defamed has a right of action. Civil Code, § 3841. The statement must be no broader than the interest to be subserved demands. The persons to whom the statement is published must be limited to those to whom the interest to be promoted requires that the information should be given. If it be published to strangers wholly without interest in the matter, the communication loses its privilege. Care must be taken that the words reach only those who are concerned to hear them. If one deliberately adopts a method of communication which gives unnecessary publicity, this is a circumstance to be considered by the jury in determining whether the statement was really made in good faith. Care must also be taken not to embrace within the statement matter wholly unnecessary for the protection of the interest intended to be subserved by the communication. Exaggerated expressions must be avoided; for the privilege may be lost by the use of intemperate and violent language, when the circumstances are such that utterances of such character are clearly uncalled for. Odgers on Libel and Slander (text-book series), t. p. 184. Mr. Townshend says: "We venture, with much hesitation, to suggest the rule as to privilege to be: one may publish, by speech or writing, whatever

he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not *unnecessarily* made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights." Townshend on Libel and Slander (4th ed.), t. p. 301. "Where the expressions employed are allowable in all respects, the manner of the publication may take them out of the privilege." Newell on Slander and Libel (2d ed.), § 66, p. 477. But mere publication to a stranger will not always destroy the privilege, if it appears that the communication, *prima facie* privileged, was made in the hearing of third persons not legally interested, when the presence of such persons was merely casual and not sought by the defendant; or if it appears that the presence of the third persons at the time of the publication was due to the act or conduct of the party complaining, the privilege would not be lost. Townshend on Libel and Slander (4th ed.), § 244 et seq.; Odgers on Libel and Slander (text-book series), t. p. 184 et seq. But it would be otherwise if the defendant purposely sought an opportunity of making a communication *prima facie* privileged, in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff. Newell on Slander and Libel (2d ed.), § 66, p. 477. To make the defense of privilege complete in an action of libel, good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only, must appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying upon the privilege. All of these questions are, however, questions of fact for the jury to determine, according to the circumstances of each case, under appropriate instructions from the court.

6-8. The defendant company having discharged the plaintiff from its service, when it came to its knowledge that there were in his possession tickets which had been delivered to him, which while in its employment he would have had a right to sell, and which he had either failed or refused to surrender, the company had a right, in order to protect its own interest, to take such precautions as were necessary to prevent the use of the tickets by persons not entitled to use them. As the conductors upon the

trains were the employees to whom these tickets would be presented in the event they fell into the hands of persons not entitled to them, the company had a right to communicate to these employees the fact that the tickets were outstanding, accompanying this statement with instructions as to what should be done by them whenever the same were presented. The communication, therefore, to the conductors through the medium of the division superintendents and to any other employees who were apt to be misled by these tickets being presented by persons not entitled to them, such as porters upon sleeping-cars, was a communication made by the railroad company for the protection of its interest; and, if couched in language no broader and no stronger in its terms and in its effect than was necessary for this purpose, would be a privileged communication within the meaning of the law, provided of course it was made for the sole purpose of protecting the interest of the company, and not for the purpose of injuring the plaintiff. This much was strongly intimated by Mr. Justice Lamar when the case was here upon a former occasion. *Central of Ga. Ry. Co. v. Sheftall*, 118 Ga. 867 (2). While the controversy now before us grows out of the same transaction referred to in the case just cited, the present case is not the same case that was here before; for it appears that the present petition was filed after the decision of this court, and embraces not only what was alleged in the petition in the former case, but also what was sought to be inserted therein by amendment, and other allegations in reference to publication to persons other than employees at different points along the line of railway. It appears from the petition, as well as from the evidence, that the publication of this bulletin was not limited to those employees whose duties were connected with tickets, but that the bulletin was posted in various places in the offices of the company where it was not only the right of all the employees, but the duty of a large number of employees other than conductors and employees connected with tickets, to read the same; and in addition to this, there is evidence that at some of the places, while the public was not expected to come to the offices where the bulletin was posted, still members of the public were allowed there, and some persons not connected with the company in any way did actually read

the bulletin. If the presence in those places of persons not connected with the company was merely casual, and from all the circumstances as to the manner and the place in which the bulletin was posted it was apparent that the company did not intend the publication for the public, the fact that one or more persons casually passing through the office had seen the bulletin would not alone be sufficient to destroy the privilege. It would be a question for the jury whether the business of the company at the place the bulletin was posted was carried on in such a way that the company must have known, at the time the bulletin was posted, that persons other than employees would probably read the same. But the company knew that the bulletin in this place would be read by a large number of employees who had no concern whatever with the matter to which it referred; and the mere fact that the persons who saw and read it were employees does not make the communication privileged, unless it was necessary for the protection of the company that these employees should know of the matter.

If the company had reason to believe that its interests were imperiled by the failure or refusal of the plaintiff to deliver these tickets, it had the right to communicate to its employees connected with that department of the work where the tickets would be used the facts in relation to them, with appropriate instructions as to what should be done in case they were presented. But it was in no way necessary that these facts should be communicated to the large body of its employees without reference to whether they had any connection with this department of its business. If in its system of business its bulletins are so posted as to be read by all of its employees without reference to whether they have any connection with the matter stated in the bulletin, the company must take care that the bulletins are couched in such terms that they will not be defamatory of any person. The company was privileged through its bulletin to submit to its conductors, division superintendents, and even porters of sleeping-cars, statements and instructions on the subject of the tickets; and if it made a mistake honestly and in good faith, the person injured would be remediless. But if it spoke to the large body of its employees who had no concern in the matter, and if the bulletin was so worded as to be libelous in its terms, or libelous

under circumstances which were probably known to those who read, the company must be satisfied to rest under the same liability that any other would rest who frames and publishes a libel. It was not at all necessary that the name of Sheftall should have been embraced in the bulletin. Neither was it necessary that the expression "tickets lost and scalped" should have been used. The purpose of the bulletin could have been fully accomplished by omitting those words and all reference to Sheftall, giving merely the numbers of the tickets and the instructions with reference thereto. The company had the right, however, to use the name of Sheftall, if it had reasonable grounds to suspect that he was misappropriating, or would misappropriate, the tickets, and to use words that would convey that idea in communicating the facts to employees who were concerned with the tickets. But if in communicating the facts to other employees it used the name of Sheftall in a connection which would carry the implication that he had been guilty of wrong-doing, it has no right to claim the privilege of the law.

9. The court in the opening of its charge stated to the jury the substance of each of the allegations in the petition, following such statement with the defendant's reply thereto; but there was no distinct, clear, and unequivocal submission to the jury, in the main body of the charge, as to the effect upon the claim of privilege of the fact that the defendant unnecessarily published the communications to those who had no concern with the subject-matter thereof. This was the gist of the plaintiff's case. He could not hope to recover under the evidence if the publication was only to the conductors and to other employees connected with the ticket department of the company. His right to recover, if any exists at all, is upon the claim that this communication, privileged as to one class of employees, was published to another class of employees, when the right to publish to them was not embraced within the privilege of the law, or that it was published to others than employees, and that the publication was either intentional, or it was due to negligence in the manner of publication to proper employees. We think this was such a vital issue in the case that the plaintiff was entitled to a clear and specific instruction on the subject, even though no written request was made therefor.

10. When the case was here before, it was held that it was a

question for the jury to determine whether the words complained of were really libelous under the circumstances and that those who read understood them in the sense alleged. 118 Ga. 867. See also *Holmes v. Clisby*, 118 Ga. 820. It was not intended, in the language used by the learned Justice who wrote the opinion in the case, to lay down the rule that it was a part of the plaintiff's case to show, as a matter of affirmative proof, what was understood by each person who read the bulletin; but it was intended to mean that the jury should be left to determine whether the language of the publication, under the circumstances in which it was published, would convey to the mind of an ordinary person, that is, a person of average intelligence, that Sheftall was charged with an intentional and wilful misappropriation of the property of his former employer, and that he was for that reason guilty of a crime against the laws of the State. It may be that many persons would read the bulletin and be able to swear that no such impression was made upon their minds, and it may be that many other persons could swear to the contrary. But this was a question to be determined, not by witnesses, but by the jury, and it was for them to say whether the writing, under all the circumstances, was such as inevitably to convey to the mind of a man of average intelligence the impression that Sheftall had misappropriated the property of his employer. If the jury were to reach this conclusion, taking into consideration their knowledge of the meaning of the words, the impression they carried, and the circumstances under which they were used, it was not incumbent upon the plaintiff to prove any more than that some person other than those who were entitled to read the bulletin actually read it. Any persons who read the bulletin could be called as witnesses to testify as to the impression made upon their minds as a result of such reading, to aid the jury in determining the question of libel or no libel, but their evidence would not be conclusively binding on the jury as to the character of the writing and its true meaning under the circumstances in which it was published.

11. The motion for a new trial complains of various parts of the charge, but we do not deem it necessary to refer to these assignments of error in detail. Some of them were not at all in accord with the views above expressed, and there were some inaccuracies

in the charge which will be apparent to the judge on another trial, when what is now said is read in connection with what was said by Mr. Justice Lamar when the case was here before. The motion also contains complaints of certain rulings upon the admission of evidence. The plaintiff sought to prove the effect of the publication upon members of his family when the matter was discussed at home. We think this evidence was properly rejected. If the writing was a libel, it could have no other effect than an injurious one upon the feelings of any one interested in the plaintiff, and human experience, and not direct testimony, was all that was necessary to convey this to the jury. It was also sought to prove by the plaintiff that the libel had injuriously affected him with his friends and that their conduct had changed towards him. This was also properly rejected; for the same human experience which would enable the jury to say that a man's family would be harassed and distressed by the publication would enable them to ascertain that it would have the effect to estrange his friends.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

FIRST STATE BANK v. AVERA. et al.

1. It is incumbent upon a party excepting to the report of an auditor in an equity case, when the exceptions thereto involve a consideration of the evidence on which the auditor based his findings, to set forth, in connection with each exception of law or of fact, the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or to at least point out to the court where such evidence is to be found in the brief of the evidence prepared and filed by the auditor. The decision in the case of *White v. Reviere*, 57 Ga. 386, was made with reference to the procedure which obtained prior to the passage of the act of December 18, 1894, which outlines the practice now to be observed in excepting to an auditor's report in such cases.
2. A party may, after the hearing of a case before an auditor has been concluded but before he has made his report, so amend his pleadings as to make the same conform to the evidence admitted on the hearing without objection; but he can not, as a matter of right, then insist upon being afforded an opportunity to offer evidence to sustain an amendment which introduces new and distinct issues of fact. What was the character of the proffered amendment in the present case can not be determined without considering certain evidence which the party offering it claims was admitted without objection, and which is relied on as authorizing the amend-

ment so as to make the pleadings conform to the proof; and as such evidence is not set forth or pointed out in the exception taken to the refusal of the auditor to allow the amendment, the court below was not constrained to pass on the merits of the complaint made of its disallowance.

Argued May 19, — Decided August 2, 1905.

Exceptions to auditor's report. Before Judge Sheffield. Terrell superior court. May 24, 1904.

H. A. Wilkinson and *J. G. Parks*, for plaintiff in error.

Haygood & Cutts, *C. L. DeVaughn*, and *A. M. Raines*, contra.

EVANS, J. This was an equitable proceeding instituted by John D. Avera, in behalf of himself and as next friend of certain minors, against the First State Bank and J. W. Wooten. The case was referred to an auditor, who duly made his report. Exceptions both of law and of fact were filed by the First State Bank, but the court disallowed each and all of them, and the bank sued out a bill of exceptions to this court.

1. On the hearing here, counsel for the defendants in error called attention to the fact that the report of the evidence made by the auditor consisted of the questions and answers taken down by the stenographer, with no attempt to brief the testimony, and that in none of the exceptions filed to the auditor's report did the complaining party undertake to set forth the testimony bearing upon the particular conclusion of law or of fact excepted to, or attempt to point out such testimony in the report of the evidence filed by the auditor. To intelligently pass upon any given exception would, therefore, involve a close reading and scrutiny of all of that voluminous report. The exceptions serve no other office than to voice the general complaint of the bank that certain findings of the auditor were wrong, and no effort has been made to save the time and labor of the court and thus effectuate the object of the statute authorizing the submission to an auditor of cases of this nature. In *Hudson v. Hudson*, 119 Ga. 638, it was held that an exception to an auditor's report "should not be so incomplete as to force the court to search through the record to find error;" and in the later case of *Butler v. Railway*, Id. 959, it was distinctly ruled that "The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the

evidence, to point out by appropriate reference to the auditor's brief of evidence, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, renders the report of the auditor of little or no assistance to the court, and is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law." This ruling was in accord with the equity practice which generally obtains elsewhere, and was followed in *Weldon v. Hudson*, 120 Ga. 699, *Perkins v. Castleberry*, 122 Ga. 294, and *Armstrong v. Winter*, 122 Ga. 869. Tested by these decisions, the exceptions to the auditor's report filed in the present case were fatally defective, and the judgment disallowing them should be upheld. But it is insisted that these decisions ignore and override that pronounced in the case of *White v. Reviere*, 57 Ga. 386, wherein this court held that "Exceptions to an auditor's report need not set forth any of the evidence" adduced on the hearing before him, "more especially where the auditor himself has reported all the evidence and thus made it part of the record." As the practice stood at the time that case was decided, it was not incumbent on the auditor nor was he to be expected to report the evidence; so no brief thereof could be referred to, as can now be done, the auditor now being required to "reduce to writing a brief of the oral and documentary evidence submitted by the parties." Civil Code, § 4585. The practice then was altogether different; for when exceptions were filed to the report of an auditor, the facts therein reported were taken as prima facie true and had to be overcome by evidence submitted by the excepting party to a jury, unless the record disclosed that evidence to rebut them was offered and illegally rejected; and the report was admitted on the trial as evidence of the truth of the recitals of fact therein made. *Camp v. Mayer*, 47 Ga. 414 421-2. It was not necessary, under the practice which then obtained, that the auditor "should append to his report the evidence on which it" was based. *Ibid.* 415 (9). His report, which was treated as prima facie evidence, was "not a report of the facts, but a report on facts; or, in other words, the result or conclusion which the auditor [drew] from the testimony before him." *Anderson v. Usher*, 59 Ga. 581. And "the burden was on the exceptor to show error in it, and to make

good his exceptions. When it was ordered filed, and leave and time were given to except thereto, it became such evidence." *Arthur v. Commissioners*, 67 Ga. 224. It was incumbent on the excepting party to satisfy the court that he had just cause of complaint; but this, it was held in 57 Ga., he could do by specifically excepting to the conclusions reached by the auditor, without exhibiting to the court a brief of the testimony on which such conclusions were based; and his exceptions were treated as pleadings which had to be sustained by original evidence on a trial before a jury, in the event the court approved them as good upon their face.

This procedure, which was a departure from the English equity practice, no longer obtains. It has been superseded by an altogether different system, more in accord with the practice originally adopted by courts of equity, which was introduced by the act of December 18, 1894. Acts of 1894, pp. 123-126; Civil Code, §§ 4581-4601. The auditor must now report not only his conclusions, but the evidence upon which he based the same; and while his report is yet treated as *prima facie* true, the excepting party is at liberty to overcome this presumption of its correctness by directing the attention of the court, by way of proper exceptions, to the fact that the evidence reported by the auditor does not sustain his findings. If it be doubtful, when the testimony is meager or conflicting, whether a particular finding of fact was warranted, the court, in the exercise of a broad discretion, may order a jury trial on that or other similar issues; but the trial is to be had only upon such evidence as was adduced before the auditor, and such newly discovered evidence as could not have been procured and submitted on the hearing before him. That is to say, the rulings and findings of the auditor are merely brought under review by exceptions filed to his report, as would be the decisions and judgment of an inferior court of original jurisdiction; and "all exceptions shall clearly and distinctly specify the errors complained of," and not leave the court to seek errors to which its attention is not thereby specifically directed by proper reference to the report of the auditor and the brief of the evidence which the statute prescribes shall accompany it. The requirement that the auditor shall prepare and file a brief of the evidence is for the very purpose of enabling the excepting

party to sustain his exceptions by pointing out the fact that the conclusions reached by the auditor were not supported by the evidence submitted before him. See 4 Cur. Law, 1261.

2. A hearing of the case was had before the auditor on February 3, 1904, and at the conclusion of the evidence counsel for the respective parties were granted the privilege of submitting written briefs on or before May 6. On May 10, after the hearing but before the auditor had made his report, an amendment to the answer of the defendants was presented to him by their counsel. He declined to allow this amendment, and exception to his refusal to do so is taken by the defendant bank. Under the Civil Code, § 4583, an auditor is authorized to allow amendments to pleadings; and he should allow any appropriate amendment submitted, after the hearing before him has been concluded and prior to his report. But the amending party is not entitled, as a matter of right, to offer evidence to sustain an amendment which introduces new and distinct issues of fact. No motion to reopen the case was made, and it was at least discretionary with the auditor whether or not he would afford the defendants an opportunity to present matters of defense for the first time set up in the proffered amendment. In so far as it merely adjusted the pleadings to the evidence which had been admitted on the hearing without objection, the amendment was timely and should have been allowed by the auditor. *Cureton v. Cureton*, 120 Ga. 560 (2), 566-7. Counsel for the bank insist this was the sole purpose and effect of the amendment offered. We can not, however, undertake to pass on this contention, as the exception taken to the refusal of the auditor to allow the amendment does not set forth or point out the testimony or documentary evidence, not covered by the original answer, upon which counsel rely as justifying its amendment so as to make the pleadings conform to the proof. The overruling of this exception is accordingly upheld.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Fish, P. J., disqualified.

CLEGG LUMBER COMPANY *v.* ATLANTIC AND
BIRMINGHAM RAILWAY COMPANY.

1. Where a bill of exceptions recites that it was presented to the judge within thirty days from the rendition of the judgment complained of, and the judge certifies that the recitals of fact therein are true, it is not cause to dismiss the writ of error that the certificate of the judge bears a date prior to the rendition of the judgment complained of, the date appearing on the certificate being palpably the result of oversight or of a typographical error.
2. While the evidence authorized a finding for the plaintiff in some amount, there was no evidence as to what the exact sum due was; and therefore a verdict for the plaintiff for forty dollars was contrary to law.

Submitted July 11, — Decided August 2, 1905.

Complaint. Before Judge Henderson. City court of Vienna.
November 15, 1904.

W. H. Dorris, and *J. T. Hill*, for plaintiff in error.

J. L. Sweat and *Crum & Jones*, contra.

CANDLER, J. 1. From the bill of exceptions it appears that the brief of evidence in this case was filed, in accordance with the terms of the judge's order, on November 15, 1904, and that the judgment overruling the motion for a new trial, which is assigned as error, was rendered on the same day. The bill of exceptions also recites that it was tendered to the judge within thirty days from the rendition of the judgment complained of; and this, together with the other recitals of fact therein contained, the judge certifies to be true. The certificate itself, however, bears date November 14, 1904, or one day prior to the rendition of the judgment complained of; and on the call of the case in this court the defendant in error moved to dismiss the writ of error, on the ground that it appears that the bill of exceptions was presented and certified prior to the rendition of the judgment and the filing of the brief of the evidence. In a statement filed by counsel for the plaintiff in error it is asserted that the dating of the judge's certificate to the bill of exceptions, November 14, was a typographical error on the part of the stenographer who made out the certificate, and that as a matter of fact the bill of exceptions was presented and certified on December 14, 1904. It is of course plainly evident that the dating of the certificate to the bill of exceptions as November 14, 1904, was an error, typographical or otherwise; for a bill of exceptions certified before the judgment complained of was

rendered is not to be considered as a possibility. As to the exact date upon which the bill was certified, however, we are left completely in the dark so far as the record is concerned, and the record is the only thing to which we can look in reaching a conclusion in regard to the matter. To all intents and purposes, therefore, the bill of exceptions is accompanied by an undated certificate to the effect that the recitals of fact in the bill are true. While, as has been repeatedly ruled, it must affirmatively appear that the bill of exceptions was presented to the judge within the time required by law, we know of no law which requires that the certificate be dated, or that the exact date of the presentation to the judge shall appear. There is nothing in either the bill of exceptions or the transcript of the record to indicate that the former was not presented within time; and as the judge has certified to the truth of the recital in the bill of exceptions that it was presented in time, the writ of error should not be dismissed on account of what is palpably a typographical error in dating the certificate. See *Stamps v. Hardigree*, 100 Ga. 160.

2. This was a suit by the Atlantic and Birmingham Railroad Company against the Clegg Lumber Company, on an open account for demurrage on two cars of lumber, the amount declared on being \$64. The lumber company in its answer denied indebtedness, and set up a cross-demand against the railroad company for over four hundred dollars damages on account of the alleged negligent burning of the lumber. The jury found "for the plaintiff forty dollars as demurrage." The defendant moved for a new trial, solely on the grounds that the verdict was contrary to law and the evidence; the motion was overruled, and it excepted. The evidence on most points was conflicting, and would have supported a verdict in favor of either party to the suit. An examination of the record, however, discloses a fatal defect in the plaintiff's case, in that there was no evidence upon which a verdict in its favor for any fixed amount could be based. The jury were authorized to find that the defendant was indebted to the plaintiff for demurrage in some amount, but there was nothing to indicate what that amount was. True, one witness testified flatly that the lumber company was due the railroad company sixty-four dollars for demurrage on two cars of lumber; but upon cross-examination it appeared that he based his testimony on a calculation that one

dollar per day was a reasonable charge for demurrage, and that he did not know how many days the cars had stood on the company's tracks; and there was likewise a total failure on the part of any other witness to fix the length of time for which demurrage was due. It will thus be seen that the verdict for the plaintiff for forty dollars was without evidence to support it; and the court should have granted a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

TOWN OF POULAN *et al.* v. ATLANTIC COAST LINE
RAILROAD COMPANY.

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123	605
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1. The affidavits sent up with the record and purporting to have been used as evidence on the hearing of the application for injunction can not be considered, not being identified in any way by the judge as having been so used.
2. Where a railroad company acquired the fee in land which was afterwards embraced within the limits of an incorporated town, and constructed a railroad over such land, the municipal authorities could not, without the payment of compensation to the company, construct a street crossing and extend a street over its right of way and track; and where an attempt was made to do so, an injunction was properly granted.
3. Power delegated by the State to a municipal corporation to "condemn property for the purpose of laying out new streets and alleys, and for widening, straightening, or grading, or in any way changing the street lines and sidewalks of said town," is sufficiently broad to authorize the condemnation of so much of the right of way of a railroad company as may be necessary for the construction of a street crossing and the extension of a street over such right of way.
4. The act approved August 4, 1904, amending the charter of the Town of Poulan, and conferring upon it power to condemn private property for the laying out of streets, is not subject to the constitutional objections that it contains matter in the body of the act different from what is expressed in the title, and amends a law by mere reference to its title. Nor is such act unconstitutional because it fails to provide a method for assessing the damages to be paid the owner of property condemned. The general law furnishes the method for making such assessment.
5. The decision of a municipal corporation, to which the general power has been delegated to lay out streets, that a street at a given point is necessary for the welfare of the inhabitants of the municipality, will not be interfered with by the courts, unless there has been a palpable abuse of the discretion vested in the municipal authorities, or manifest injustice and oppression be shown.
6. The facts alleged in the petition do not show that the use of a part of the right of way of the railroad company for the street and crossing will be

so inconsistent with the use to which the company has already devoted it as to authorize a court of equity to enjoin the municipal authorities from instituting condemnation proceedings.

Argued June 19, — Decided August 2, 1905.

Injunction. Before Judge Spence. Worth superior court.
April 24 1905.

The Atlantic Coast Line Railroad Company filed a petition for an injunction against the Town of Poulan and its municipal officers. The material facts as set out in the petition are substantially as follows: For more than twenty years the plaintiff and its predecessors in title have been in the complete, exclusive, and adverse possession of a line of railroad through territory now within the limits of the Town of Poulan. In 1897 the Brunswick and Western Railroad Company, in order to confirm its title, obtained a deed conveying to it a right of way through the limits of the present Town of Poulan, together with other adjacent lands, covering a strip measuring one hundred feet from the center of the track of the railroad company each way. The plaintiff obtained title to this strip from the grantee of the railroad company above named, and holds the same in fee. In March, 1905, the mayor and council of Poulan undertook, without the knowledge or consent of the plaintiff, and without any notice to it, and without proceeding to condemn, to put a crossing over the track of the plaintiff, bridging a ditch on the side of the track, at the foot of where Hunton street would cross the railroad, and extending that street through the plaintiff's land to a named creek. When the work of building the crossing was partly finished, agents of the plaintiff were proceeding to restore the property to its original condition, when they were arrested by the municipal authorities and confined in the city prison, and, after a trial, fines were imposed upon them. Several years before the town was incorporated, the plaintiff selected a convenient site for a depot and erected a depot thereon upon its right of way, and has since put in a side-track on the opposite side of the depot from the main line. At the time the depot and side-track were constructed there were two street crossings over the railroad within two blocks of each other, both of which were convenient and accessible to all parts of the town. Since that time Hunton street has been opened down to and against the railroad on the

north side, and this street is the main thoroughfare to and from the depot and yards. This is the point where most of the necessary shifting of cars takes place to and from the side-track. The depot is only about fifty feet away from the proposed crossing, and it would be very inconvenient and dangerous to allow such crossing to be constructed. The uses to which the town authorities design to put this crossing are inconsistent with the use to which the plaintiff has already appropriated the land. The defendants have given notice that they will proceed to condemn the property of the plaintiff for the aforesaid crossing, claiming the power to do so under an act amending the charter of the town, approved August 4, 1904. This act is unconstitutional, because there is nothing in the title to indicate what is contained in the body of the act; it refers to the act sought to be amended only by name; there is no description of the law sought to be amended, either in the title or the body of the amending act; and the act does not provide a method for ascertaining the amount of damages resulting from the condemnation. The plaintiff has, at great expense, arranged to use and has appropriated the land at the point where the crossing is to be constructed for depot grounds, not only with a view to present necessities, but with a view to increased business and additional tracks in the future; and the use of the crossing by the town involves the practical extinguishment of the former use to which the plaintiff has appropriated the land at that point. The plaintiff has no complete and adequate remedy at law. The prayers were, that the defendants be enjoined from in any manner interfering with the plaintiff in its complete enjoyment and use of the land, right of way, track, and other property at the proposed street crossing as heretofore, or from interfering with the plaintiff in removing whatever part of the crossing has already been put down, and in restoring the track and grounds to their original condition before the acts of the defendants herein complained of; that the defendants be also enjoined from instituting condemnation proceedings under the act of 1904; and for general relief. A restraining order was granted, and at the hearing the defendants showed, for cause against the granting of the injunction, a demurrer, an answer, and affidavits of various persons. The court granted an order that "the injunction do issue as prayed, until the final hearing of this cause, en-

joining and restraining the said defendants from in any manner seeking to open Hunton street south of the track of the complainant, upon all of the grounds alleged and relief prayed for in plaintiff's petition." The defendants excepted.

Payton & Hay, for plaintiffs in error.

Kay, Bennet & Conyers and *Perry & Tipton*, contra.

COBB, J. 1. The bill of exceptions specified, as necessary to an understanding of the case, to be transmitted with the record, the affidavits of various persons; and the record contains numerous affidavits which it is claimed were used at the hearing. There is, however, nothing to identify these affidavits as having been so used. None of them are incorporated in the bill of exceptions or identified by the judge. Under such circumstances it is settled that this court can not consider the affidavits in determining the questions raised in the case. *Sayer v. Brown*, 119 Ga. 539 (1). As the judge granted the injunction prayed for, in passing upon the question whether he erred in so doing the allegations of the petition must be taken as true.

2. The order granting the injunction was as broad as were the prayers of the petition. The first question to be determined is whether or not there is error in so much of the order as restrained the defendants from proceeding to build the crossing without the institution of condemnation proceedings or the making of any arrangement with the plaintiff for compensation. This question may be briefly disposed of. The petition distinctly alleges that the plaintiff is the owner of the fee in the land over which the street is proposed to be extended, and that its title was acquired before the Town of Poulan was incorporated, the act of incorporation having been passed in 1899. Acts 1899, p. 265. This being so, it was not competent for the town to construct a street crossing over the land of the plaintiff without making provision for compensation for the damage thus inflicted upon it. *Mayor of Savannah v. Shell Road Co.*, 88 Ga. 342, 95 Ga. 387; *Atlantic R. Co. v. S. A. L. Ry.*, 116 Ga. 412; *Ga. R. Co. v. Union Point*, 119 Ga. 809, 815, and cit. The act of the defendants in endeavoring, against the consent of the plaintiff, and without instituting condemnation proceedings, to construct a street crossing over the company's property was clearly illegal,

and the judge properly granted an injunction to prevent the completion of such act.

3. A general authority to a municipality to lay out, widen, straighten, or change streets includes the power to construct a street crossing across a railroad track in the city. *Trustees v. Atlanta*, 93 Ga. 468; 1 Lewis on Eminent Dom. § 266; Elliott on Roads & Streets, § 221; 2 Dill Mun. Corp. (4th ed.) 689, note 1. This power can not, however, be exercised against the consent of the railroad company, unless the further power is given the municipality to condemn so much of the property of the company as may be necessary for such use. The act of August 4, 1904, amending the charter of the Town of Poulan, was entitled "An act to amend the charter of the Town of Poulan, and for other purposes." It was provided in section 2 of the act that the town council should "have full and complete control of the streets and sidewalks, alleys and squares of the town, and shall have full power and authority to condemn property for the purpose of laying out new streets and alleys, and for widening, straightening, or grading, or in any way changing the street lines and sidewalks of said town." The power thus conferred is certainly sufficiently broad to authorize the construction of a street crossing over the plaintiff's property, if the act is not subject to some constitutional objection.

4. The objection raised to the title of the act is without merit. An act to amend an act incorporating a named town is sufficiently broad to cover any enactment germane to the general subject of incorporating a town. *Mayor of Macon v. Hughes*, 110 Ga. 795 (1); *Dallis v. Griffin*, 117 Ga. 411, and cit.

A further objection was made that the act of 1904 was obnoxious to the constitutional provision (Civil Code, § 5779) prohibiting the passage of an amendatory law which merely refers to the title of the law to be amended. The title of the amending act refers to the charter of the Town of Poulan, and the first section of the act describes the act to be amended as "an act incorporating the Town of Poulan, in the county of Worth, approved December 21, 1899." This is a sufficient identification of the act sought to be amended. *Welborne v. State*, 114 Ga. 794 (7), 821.

It is also insisted that the act is unconstitutional, because no method of ascertaining the damages is provided, and no provision

is made that they shall be paid before the property is taken or damaged. When the State delegates to another the right to condemn property for a public use, and does not in the act delegating such power provide a method for its exercise, the general law of the State prescribing the procedure and the method of ascertaining the damages is by implication a part of the law delegating the power, and must be pursued when property of another is sought to be taken or damaged. *Marietta Chair Co. v. Henderson*, 121 Ga. 399 (5). As the time when payment is to be made is not stated in the act, it is necessarily to be inferred that the General Assembly intended that the constitutional requirement that the damage should be *first* paid should be complied with.

5. It is next contended that it was not necessary to the welfare of the inhabitants of the Town of Poulan that the track of the railroad company should be crossed by a street at the point where the crossing was proposed to be constructed. The general rule is that "private property can not be taken for public use unless there is a necessity for such taking; for the taking of property when not at all necessary for a public purpose, or the taking of more property than is necessary for a given public purpose, is in effect a taking for private use." *Atlantic Railroad Co. v. Penny*, 119 Ga. 481 (2). The State can determine the necessity for the taking, and the courts will not interfere. If the State delegates to a municipal corporation the right to judge of the necessity, the courts will not generally control its decision. *Matthiessen Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Curry v. Trustees*, 15 Ill. 320; *Methodist Prot. Church v. Baltimore*, 6 Gill, 391. A general grant of authority to control streets and sidewalks, and lay out, open, widen, etc., streets and sidewalks, does not vest in the municipal corporation the exclusive power to decide the question of necessity, but its decision is, under some circumstances, subject to review by the courts. The decision of the question is, however, in the first instance vested in the municipal authorities, and is one addressed to their sound discretion. This discretion will only be controlled by the courts when there has been a palpable abuse of it; or, as intimated in one case, where "the case shows manifest injustice, oppression, and gross abuse of power." *Dunham v. Hyde Park*, 75 Ill. 371. See also, on this subject, 1 Smith's Mod. Law Mun. Corp. §§ 701,

702; 27 Am. & Eng. Enc. Law (2d ed.), 105; Elliott on Roads & Streets (2d ed.), §§ 189, 345; 2 Dill. Mun. Corp. (4th ed.), § 601. The allegations of the petition make a case where the extension of the street will be greatly to the inconvenience of the plaintiff and possibly of little benefit to the inhabitants of the town. But these allegations do not present a case of such a palpable abuse of discretion that a court of equity ought to interfere by injunction to prevent its exercise.

6. Finally it is claimed that the construction of the crossing would be an appropriation of the land of the plaintiff to an inconsistent use from that to which the railroad company had previously devoted it; that the company would be practically deprived of the use of its property; and that such an appropriation can not be made by the town without express legislative authority to make the particular appropriation sought to be made in this case. The case of *City Council of Augusta v. Georgia Railroad & Banking Company*, 98 Ga. 161, is relied on to support this contention. In that case the city sought to lay a street through the yard of the railroad company, in which were situated numerous tracks, switches, etc., in constant use in the business of the railroad. The railroad company applied for an injunction, which was granted. The chancellor found from the evidence that "the opening of the street would practically amount to a destruction of the railroad company's use of its yard for shifting and drilling cars, though it might not seriously interfere with the lesser use of the main tracks for the ordinary travel of trains." The judgment granting the injunction was affirmed, Mr. Justice Atkinson in the course of the opinion saying: "If the conditions are such that they may be reasonably made to consist, there is no such encroachment upon the prior public use as even appreciably to impair, much less extinguish it; and therefore, even though some slight inconvenience may result to the prior occupant, there is no reason why a second public use, when granted even in general terms, may not be held to confer upon the public authorities the right in such manner to exercise it. A different result follows, however, when the enjoyment of the second use involves the practical extinguishment of the former, or renders its exercise so extremely inconvenient and hazardous as practically to destroy its value. In such a case the right to enjoy the second use must rest upon express legislative authority,

and will not be implied." We do not think the petition in the present case makes such a case of inconsistent uses as, under the decision just cited, would authorize the court to enjoin the exercise by the town of the power to condemn conferred upon it by the General Assembly. The crossing is to be fifty feet from the company's depot, and traverses only two tracks, the main line and a siding at a small station, and therefore would not seriously interfere with the use of the depot and grounds. The crossing might at times somewhat inconvenience the company in the conduct of its business, and possibly require it to be more circumspect and careful in order to avoid injury to persons using the crossing; but its use is not, under the facts alleged, so inconsistent with the prior appropriation by the company as to destroy, or even seriously impair, the company's right to use its property for the purposes to which it had previously devoted it. On the subject of inconsistent uses, see *Brunswick Railroad Co. v. Waycross*, 91 Ga. 573. See also, in this connection, Elliott on Roads & Streets (2d ed.) § 221; 1 Lewis on Em. Dom. (2d ed.) § 266; 2 Dill. Mun. Corp. (4th ed.) § 588 (note). Our conclusion is that the judge properly enjoined the defendants from constructing the crossing before making provision for compensation to the company for the damage which might thus be inflicted upon it; but that he did err in restraining the municipal authorities from instituting proceedings to condemn so much of the company's property as might be necessary for the crossing and street extension. Direction is, therefore, given that the order be so modified as to permit the defendants to institute such proceedings to condemn.

Judgment affirmed, with direction. All the Justices concur except Simmons, C. J., absent.

SEABOARD AIR-LINE RAILWAY v. OLSEN.

FISH, P. J. The petition in an action brought by a passenger against a railway company for personal injuries alleged, as an act of negligence on the part of the company causing the plaintiff's injuries, that the platform, upon which plaintiff attempted to alight from the car, "was . . . located too far from the step of the . . . coach from which she alighted," and that, "the distance from the car step to the platform was more than an ordinary step for an individual making an average step." *Held*, that as

such allegations were mere conclusions of the plaintiff, a special demurrer thereto, calling for a more specific statement of the distance between the platform and the car step, should have been sustained, in the absence of a proper amendment. *Blackstone v. Railway Co.*, 105 Ga. 380.
Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued June 21, — Decided August 2, 1905.

Action for damages. Before Judge Parker. Glynn superior court. August 17, 1904.

Crovatt & Whitfield, for plaintiff in error.

Courtland Symmes and Krauss & Shepard, contra.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* WAYCROSS
ELECTRIC LIGHT AND POWER COMPANY.

123	613
1129	668

- CANDLER, J. 1. On the trial of an action against a railroad company for damages on account of the killing of stock, it was error for the court, after charging that a presumption of negligence arose against the company upon proof that the stock was killed by the running and operation of its train, to add: "but that presumption is subject to be rebutted by evidence introduced by the railroad company showing that everything was done by its agents and servants which could have been done under the circumstances to avoid the killing or the injury." The effect of this charge was to place upon the railroad company the burden of proving that its employees exercised the highest degree of care known to the law, whereas only ordinary care and diligence was required of them. *Western & Atlantic R. Co. v. King*, 70 Ga. 261; *East Tennessee R. Co. v. Daniel*, 91 Ga. 768; *Savannah R. Co. v. Wideman*, 99 Ga. 245.
2. In such a case, where the stock were not killed at a public crossing, it was also error to charge: "If you shall find that the agents and servants of defendant failed to blow the whistle and ring the bell of the locomotive, and shall further find that in such failure ordinary and reasonable care and diligence was not used, and that such failure proximately caused the death of the [stock], then, in either of these events, you should find for the plaintiff."
3. While it is permissible for a plaintiff corporation to amend its petition by alleging that since the institution of its suit its corporate name has been changed, and praying that the suit may proceed in its new name, it is incumbent upon it, in order to recover under the name as changed, to prove the allegations of its amendment upon the trial of the case.
- Judgment reversed. All the Justices concur, except Simmons, C. J., absent.*

Argued June 21, — Decided August 2, 1905.

Action for damages. Before Judge Reynolds. City court of Waycross. September 19, 1904.

Kay, Bennet & Conyers and S. W. Hitch, for plaintiff in error.
J. L. Sweat, contra.

SOUTHERN RAILWAY COMPANY v. ELLIS.

1. As set out in the petition for the writ of certiorari, the evidence in this case failed to prove the allegations of the statement of the cause of action attached to the summons. It neither identified the two shipments as being those referred to in the suit, nor did it show that the plaintiff paid to the defendant the amounts charged, nor that the payments were made under protest as alleged.
2. If a witness be allowed to give his testimony in the presence of a defendant or his counsel without objection, although not under oath, this would amount to a waiver of objection on the part of the defendant, and the omission of the administration of the oath would not furnish ground for a new trial. *Smith v. State*, 81 Ga. 480 (2); *Rhodes v. State*, 122 Ga. 568.
3. Where by inadvertence a witness was not sworn before giving testimony in regard to the case on trial, upon the discovery of such fact pending the trial there was no error in permitting him to be recalled to the stand and sworn and allowed to testify as a witness.
4. After being so recalled, if the witness were merely asked if what he had previously stated without being sworn was true, and answered that it was, in the absence of any objection this would furnish no ground for a reversal.

Submitted June 21, — Decided August 2, 1905.

Certiorari. Before Judge Parker. Applying superior court. October 11, 1904.

John Ellis Jr. brought two suits in a justice's court against the Southern Railway Company, seeking to recover in each of them on account of an alleged overcharge for freight. The summons in one of them alleged that on or about October 19, 1903, the defendant received from the Willingham Manufacturing Company, at Macon, Georgia, certain property to be delivered to the plaintiff at Baxley, Georgia; that it was so delivered, but that defendant required him to pay forty-four cents over and above the amount it was entitled to receive for transporting the property; and that he paid such amount under protest to get possession of his property. Also, that it required him to pay the sum of twenty-five cents in excess of what he should have paid on a certain bill of freight shipped "as aforesaid" on the 2d day of January, 1904, "for that said defendant received from its connecting line, to wit, the W. & A. Railway Co., who had received from the North Georgia Milling Co., a certain lot of flour from Dalton, Ga., which was delivered to plaintiff at Baxley, Ga., same being his property, except there was one sack of said flour, weighing 24 lbs., which was lost or not delivered by said defendant to plaintiff,

which was of the value of 60 cents, to the total damage of plaintiff in the sum of \$1.29." The other suit was for \$2.86. The summons alleged that on or about the 14th day of October, 1903, "Heckinger Bros. & Co. delivered to the Merchants and Marine S. Co., to be shipped via the Southern Railway Company to plaintiff at Baxley, Ga., a certain lot of furniture, and said defendant refused to deliver said furniture to the plaintiff until he paid them the sum of \$2.86 over and above the correct amount to which they were entitled for transporting said furniture, which amount plaintiff paid under protest, to his injury and damage in the sum of \$2.86." The two cases were consolidated and tried as one. A judgment was rendered against the defendant, and the case was appealed to a jury. At the trial the plaintiff was placed on the stand as a witness in his own behalf, but was not sworn. He stated that "a bill of furniture was shipped to him from Macon, Ga., and the defendant charged him for ninety pounds too much freight, which amounted to an excess of forty-four (44) cents freight according to what had been previously charged; that the defendant weighed the goods wrong and charged for ninety pounds more than they carried; that he weighed the goods on the defendant's scales and received all that he ordered; that a bill of furniture was shipped to him from Macon, Ga., and the defendant charged for one hundred and ninety pounds too much freight, which amounted to an excess of \$2.86 freight according to what he had been previously charged; that the defendant weighed the goods wrong and charged for one hundred and ninety pounds more than they carried; that he weighed the goods on the defendant's scales, and received all that he ordered." After the argument began, counsel for the defendant made the point that the witness had not been sworn. Plaintiff's counsel thereupon recalled him to the stand over objection on the part of the defendant, administered the usual oath to him, and then asked him if what he had previously stated was true, to which the plaintiff responded in the affirmative; and the case was again closed. The jury found for the plaintiff \$3.11. The defendant applied to the judge of the superior court for a writ of certiorari, which was refused, and the defendant excepted.

DeLacy & Bishop, for plaintiff in error.

LUMPKIN, J. (After stating the foregoing facts.) These combined cases involve between three and four dollars in money, and three or four points of law. The latter are sufficiently disposed of in the headnotes.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

DUBIGNON v. FINCH.

Where, in a complaint for land by an administrator, the defendants admit in their plea that the legal title was in the plaintiff's intestate at the time of her death, but aver that they are in possession under a contract of purchase from her, with the greater part of the purchase-money paid, and make a tender of the balance and pray specific performance of the contract, a motion for a nonsuit should not be granted after evidence has been introduced by the plaintiff which shows that he has been duly appointed administrator of the decedent.

Argued June 21, — Decided August 21, 1905.

Complaint for land. Before Judge Seabrook. Glynn superior court. December 7, 1904.

R. D. Meader, for plaintiff. *Ernest Dart*, for defendants.

EVANS, J. The plaintiff was nonsuited in the court below, and in his bill of exceptions complains of the judgment of nonsuit. The action was brought in the name of H. F. duBignon, as the administrator on the estate of Hannah Coburn, against John and Rebecca Finch, to recover a leasehold interest in a certain city lot described in the petition. The plaintiff alleged, that his intestate died in the fall of the year 1901, and was the owner, at the time of her death, of an estate for years in the premises, which had not expired; that the defendants were in possession of the premises, claiming that they had purchased the same from plaintiff's intestate during her life; and that it was necessary to recover the premises for the purpose of paying the debts of the estate and making distribution among the heirs of his intestate. The seventh paragraph of the petition was as follows: "Plaintiff shows that both he and the said defendants claim title, as before shown, to said land under the same common grantor, viz: Hannah Coburn." The defendants filed an answer in which they

denied the right of the plaintiff to recover, and by way of amendment set up the special defense that, in the year 1888, they bought the premises in dispute from Hannah Coburn for the sum of \$230, of which sum \$190 had been paid. They made tender to the plaintiff of the remainder of the purchase-money; and prayed specific performance of the contract of purchase, and that the administrator be decreed to make them a deed to the interest of his intestate in the premises, upon payment of the balance of the purchase-money. On the trial of the case the plaintiff introduced in evidence his letters of administration and an order of court granting his application for leave to sell the land described in the petition. A witness testified that he built the house on the lot which was in the possession of the defendants, for Hannah Coburn; that he had been told by John Finch, one of the defendants, that they rented the house from Hannah Coburn, and Denison Armstrong was collecting the rent for her, but they "couldn't get along," and he (Finch) wanted witness to take charge of collecting the rent. The witness further testified that Hannah Coburn died in 1901, and Denison Armstrong a year or so later. The plaintiff testified as to the rental value of the premises, and offered in evidence a deed from Sarah Price to his intestate, dated September 15, 1890, covering the premises in dispute, and reciting that Hannah Coburn had previously purchased the property from the grantor and had paid the purchase-money in installments, the last payment being made on April 24, 1880, and that no deed had been made, though Hannah Coburn had gone into possession of the premises in the early part of 1880 and had remained in possession since, and had made improvements thereon. The plaintiff also introduced in evidence divers receipts, signed by Denison Armstrong, each acknowledging the payment of five dollars by Finch, and covering a period from 1887 to 1900.

We think this evidence, considered in the light of the pleadings, was sufficient to withstand the motion for a nonsuit. The defendants admitted in their plea that the plaintiff's intestate had the legal title to the premises at the time of her death. Upon proof of the issuing of letters of administration to the plaintiff and the granting of the order of court providing for the sale of the property, a prima facie case was made out showing his right

to the possession of the premises, and the burden was cast upon the defendants to prove their special defense.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

123	618
128	364

BENNETT *et al.* v. SOUTHERN PINE COMPANY *et al.*

1. While under the law of this State, where property is sold for taxes, the officer making the sale executes a deed to the purchaser before the time for redemption has lapsed, yet the title acquired by such purchaser is not a perfect fee-simple title, but an inchoate or defeasible title, subject to the right of the owner to redeem within the time prescribed by the statute.
2. Although such a tax deed may be recorded, and on its face may contain no reference to the right of redemption, the public law of this State gives notice to all persons dealing with such title of the existence of that right, and of the nature and character of the title conveyed by the deed.
3. Under the act of 1874 an execution issued by the comptroller-general against a lot of wild land, for unpaid taxes due upon it, was somewhat in the nature of a proceeding in rem.
4. Where a lot of wild land was sold and the deed made to the purchaser and placed upon record, but during the time allowed for redemption the owner paid to the purchaser the proper amount, and redeemed the land and received the tax deed into his possession, but took no reconveyance, and after the lapse of the redemption period the purchaser conveyed the land to a third person for value, the latter would not acquire a title superior to that of the owner who had in fact redeemed, although he bought without notice that the redemption had taken place.

Argued June 21, — Decided August 2, 1905.

Equitable petition. Before Judge Parker. Ware superior court. January 3, 1905.

The Southern Pine Company of Georgia and J. L. Crawley filed their equitable petition against B. A. and C. O. Bennett, seeking to obtain an injunction against the defendants to prevent them from cutting timber, for the purpose of making cross-ties, on certain land. The corporation claimed to be the owner, and Crawley to have a lease to the land from it, for the purpose of cutting cross-ties, and also for making turpentine. The chain of title under which the plaintiffs claimed was as follows: A fi. fa. issued by the comptroller-general against the lot of land as wild land, for State and county taxes due thereon for the year 1875, with costs, dated October 16, 1877, together with a levy of the sheriff, dated April 2, 1878, and a memorandum

showing a sale to R. B. Reppard, June 4, 1878; a deed from the sheriff to Reppard, dated June 5, 1878; a deed from Reppard to the Reppard Land, Lumber and Sawmill Company, dated July 18, 1883, including this and other lands, for a valuable consideration; a decree from the superior court of Chatham county, in the case of Talmadge et al., trustees, against the Reppard Land, Lumber and Sawmill Company, ordering a sale of the land and other property of the defendant; a report of the commissioners, and a judgment confirming the sale; a deed from the commissioners to Talmadge; a deed from the Reppard company to Talmadge, for the purpose of confirming and approving the sale and perfecting the title; a deed from Talmadge to the plaintiff company, and leases from it to Crawley. The defendants denied that the plaintiff company was the owner of the land, or that the plaintiffs were entitled to the injunction. They set up the following defense: The land was granted by the State to Hiram Sears in 1848, and was sold and conveyed by him to Dennis Paulk in 1872. Paulk regularly made his tax returns of the land, but through an error of the receiver of tax returns the lot was sold by the sheriff in 1878 as being in default, and was bid in by Reppard for \$14. The deed made by the sheriff was duly executed, delivered, and recorded. Soon thereafter Paulk, having heard of the sale, proceeded within the time allowed by law to redeem the land, and for that purpose paid to Reppard the amount of his bid together with interest and costs. Reppard thereupon delivered to him the sheriff's deed, but neglected to make any transfer thereof in writing. Paulk held the deed during his lifetime, claimed the lot as his property, returned it for taxes, and paid them. He died in 1899, leaving his wife and daughter as his sole heirs. The daughter died, leaving her husband surviving her. The land was conveyed by deeds from the widow Paulk as to one-half interest, and by the husband of the deceased daughter as her executor or administrator as to the other half interest, under an order from the ordinary, to the Downing Company. The defendants acquired the right to cut the timber under that company. Paulk claimed the land continuously, and the representatives of his estate likewise did so, and several years ago for a period of three years or more certain persons boxed the timber on the

lot and worked on the land for turpentine purposes openly and notoriously, and without any interference, acting under the authority of Paulk.

On motion the court struck that portion of the answer setting up the defense just stated. This ruling is assigned as error. After the introduction of evidence the court directed a verdict in favor of the plaintiffs. The defendants moved for a new trial, which was refused, and they excepted.

J. L. Sweat, for plaintiffs in error. *J. C. McDonald*, contra.

LUMPKIN, J. (After stating the facts.) Certain allegations of the defendant's answer were stricken on motion. One of them was, that the owner of the land in dispute had regularly returned and paid taxes on it, "but that through an error of the receiver of tax returns said lot was sold in the year 1878, as being in default." There is no law, and it is hardly conceivable that there could be one, which would authorize a sale of land for taxes if they had been regularly returned and the taxes paid. Such a sale would be without authority and would convey no title. This particular allegation, however, is not referred to in the briefs. The argument before this court rested on one question: If, while unoccupied, wild land was properly sold for taxes, and the deed recorded, and after the lapse of the period for redemption the purchaser conveyed the land to another for value and without notice of the redemption having taken place, but in fact, within the time allowed by law for that purpose, the owner had redeemed it, but took no reconveyance from the purchaser, merely receiving possession of the tax deed from him, would the title of the vendee of the purchaser at the tax sale, or that of the original owner or his heirs (he having died), prevail? The presiding judge struck a portion of the answer setting up such redemption, on the ground that it did not appear that the subsequent vendee of the purchaser at the tax sale, or those holding under him, had any notice of the redemption. The plaintiffs claimed by regular conveyances under the purchaser at the tax sale. The defendants claimed by conveyances under the heirs of the original owner of the land.

Tax sales are creatures of statute. When, how, and under what circumstances they are to be made, and their effect when made, are matters depending upon the statute governing them.

The decisions of the courts of other States throw more or less light on the case according to whether such States have similar or dissimilar statutes. In many States a deed is not made to the purchaser at a tax sale until the time for redemption has elapsed, and is then made in such manner or upon such procedure as the statute prescribes. In some, certificates of sale are issued to the purchaser to be held until the time allowed for redemption has expired, and if no redemption is made, a deed is then executed. 2 Cooley on Taxation (3d ed.), 982, et seq. In Georgia a deed is made at once by the selling officer, but the owner may redeem within the time fixed by law. In regard to the right of redemption from tax sales it has been said: "The statutes which give the right are to be regarded favorably and construed with liberality. . . But though the statutes are to be construed favorably, yet as the right depends upon them, the person seeking to redeem must bring himself within their provisions." 2 Cooley on Taxation (3d ed.), 1023, 1025. As between the purchaser at a tax sale and the person whose property is sold, the redemption extinguishes the title, and the land is restored as it was before the sale. 2 Cooley on Taxation (3d ed.), 1051, 1052; Black on Tax Titles (2d ed.), §§ 377, 448. If the purchaser at a tax sale, within the time allowed for redemption, and for the consideration of the redemption money, makes to the owner a deed of reconveyance, it creates no new title, but simply restores the property to the same position in which it was before the sale. See authorities just cited, and also *Ivey v. Griffin*, 94 Ga. 689; *Morrison v. Whiteside*, 116 Ga. 459. In *Bourquin v. Bourquin*, 120 Ga. 115, 119, 120, Mr. Justice Lamar, after referring to the effect of a tender of payment upon a security for a debt, says: "The same principle is applicable to a tender made by the owner for the purpose of redeeming from a tax sale, under the Political Code, § 909. Thereafter the purchaser's inchoate, qualified, or defeasible estate terminates." In *McCalla v. Clark*, 55 Ga. 53, it was said: "Tender of the debt on the day it becomes due terminates the creditor's right to retain possession of a pledge held as collateral security; and it is an immediate conversion for him to refuse the tender, and retain the pledge on a claim of title based upon an alleged forfeiture for delay to make payment." In *Legro v. Lord*, 10 Mo. 161, it was said: "A legal tender, within the time pre-

scribed by law, of the amount for which an equity of redemption is held under an execution sale, is sufficient to revest the property without a deed of conveyance to the purchaser." In *Burns v. Ledbetter*, 54 Tex. 374, it was said: "A tender to the purchaser at tax sale, under the 3rd section of the act of June 2, 1873, concerning taxes, [of] the full amount of the purchase-money paid for land at such sale, within twelve months, with one year's interest on the same, at the rate of twenty-five per cent. per annum, worked *ipso facto* an immediate redemption of the land by the original owner, and left the purchaser at tax sale without title." In the report of this case it appears that a deed had been made to the purchaser. See p. 377. See also *Bender v. Bean* (Ark.), 12 S. W. 180.

The Political Code, § 913, declares: "The deed or bill of sale made by such officer shall be just as valid to the purchaser as if made under the ordinary process of law issuing from the superior court." Under this section recitals in such a deed in regard to the conduct of the selling officer, and of the levying officer, with respect to advertisements and the like, are presumptively correct. *Livingston v. Hudson*, 85 Ga. 735. And it has been held that "A purchaser at a tax sale duly made under legal levy, who is neither implicated in nor aware of any fraud contemplated by the selling officer, is not affected thereby." *Boyd v. Wilson*, 86 Ga. 379. But this section of the code is to be construed with other laws in reference to tax sales and redemptions. It does not confer an absolute and perfect title at once upon the purchaser, but a title subject to be defeated by the exercise of the right of redemption. The owners of wild lands sold for taxes were allowed the privilege of redeeming them at any time within one year from the date of sale, by the act of 1874. Acts 1874, p. 106. This time was extended to two years by the act of 1881. Acts 1880-1, p. 46, Political Code, § 910. The title obtained by the purchaser at a tax sale has been sometimes referred to as an inchoate, qualified, or defeasible estate. *Bourquin v. Bourquin*, 120 Ga. 120. He is not entitled to possession, or to rents, issues, and profits during the time allowed for redemption. *Jones v. Johnson*, 60 Ga. 260; *Elrod v. Groves*, 116 Ga. 468. The nature of the title which he has may be compared to an estate which will ripen upon a condition, or rather perhaps to one which will be defeated

upon the happening of a condition. In either event it is not a perfect title, but one subject to the right of redemption. Under the act of 1874 it was not required that the execution issued by the comptroller-general for unpaid taxes on wild lands should recite in it that the lands had been unreturned, and that the taxes thereon had not been paid. *Greer v. Ferguson*, 104 Ga. 552; *Bentley v. Shingler*, 111 Ga. 780. Under the act of 1881 (Political Code, § 821), amended by the act of 1882 (Acts 1882-3, p. 47), an execution issued by a tax-collector must recite that the lot against which the execution issued was not returned for taxation. *Southern Pine Co. v. Kirkland*, 112 Ga. 216; *Leonard v. Pilkinton*, 99 Ga. 738.

It is contended, that, under the registry laws of this State, the record of the tax deed gave notice of a title in the purchaser; that, no reconveyance having been made by him, and nothing appearing of record to show that redemption had taken place, one who bought from him without notice of a redemption would acquire a perfect title; and that to defeat the title of such a vendee it was necessary to have alleged and proved notice. Section 3618 of the Civil Code is as follows: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." It is true that a purchaser in good faith and without notice acquires title as against a prior unrecorded conveyance by the same owner, and this protection extends also to a purchaser of land at a judicial sale. *Ousley v. Bailey*, 111 Ga. 783; *Goodwynne v. Bellerby*, 116 Ga. 901; *Harvey v. Sanders*, 107 Ga. 740. But all purchasers are charged with a knowledge of the public laws of this State, and that under them a tax deed does not convey a perfect title upon its execution, but a title subject to be defeated by redemption, or one which can only ripen by a failure to redeem. The record of a tax deed gives notice when the sale took place, and, read in the light of the law of this State, one who takes a conveyance from the purchaser at such a sale is put on notice just as if the public law were written in the face of the deed. If a deed were placed on record which contained on its face a statement that it did not create a perfect title in the grantee,

but only an inchoate, imperfect title, which gave him neither right of possession nor use during a specified time, and would never become a perfect title if a certain sum were paid within the time for redeeming, all persons dealing with the grantee would be put upon notice of its conditional and defeasible character, and would take a conveyance from him subject thereto. Suppose that a deed were made to secure a debt, and on its face it declared that it conveyed title only for that purpose, and that if the debt should be paid within a time named it would cease to be of force or would be defeated, would not any person who took under the grantee take subject to the condition, and be put upon notice thereof, and inquiry as to whether the debt had been paid or the note secured thereunder surrendered, if past due? Some of the language in the decision of *Cumming v. McDade*, 118 Ga. 612, 616, might appear to indicate that a taker of a title made to secure a debt might stand in the position of an innocent purchaser. But neither the opinion in that case nor the record of file in this court shows that there was anything on the face of the deed then under consideration to show that it was made to secure a debt, rather than it was a deed of bargain and sale. If the law writes into the face of a record that a deed is conditional or defeasible, all who deal with it are as much put upon notice as if it were expressed by the words of the deed.

It is also contended that those holding under the purchaser at the tax sale in this case were protected, on the ground that they were innocent purchasers without notice of an equity. *Dill v. Hamilton*, 118 Ga. 208; *Johnson v. Equitable Securities Co.*, 114 Ga. 604; Civil Code, § 3938. What has been said above in regard to the notice given by the record of the tax deed applies with equal force to this contention. One buying the land from the grantee in that deed was not in the position of a purchaser who acts in reliance on a recorded deed which on its face conveys perfect title. On the contrary, as already stated, the laws of this State put him upon notice that the tax deed did not convey a perfect and indefeasible title, but only a title which might be defeated by redemption.

It is urged that the execution having been issued, not against the person as owner of the land, but against the land itself, the proceeding was in the nature of one in rem, and therefore the

title conveyed by the tax deed was good. In *Hilton v. Singleary*, 107 Ga. 826, it was said: "It follows from the above, that when a plaintiff in a suit for the recovery of land shows a title thereto founded upon such a sheriff's sale occurring more than twelve months prior to the commencement of his suit, and that this sale was regularly had under a fi. fa. issued by the comptroller-general, this makes out a prima facie case in favor of the plaintiff." But the prima facie case is not one which is absolutely conclusive. If it be conceded that the plaintiffs made out a prima facie case, the defendants desired to rebut it by showing that in fact there had been a redemption, and the court declined to allow this to be done.

It is further argued, on behalf of the defendants in error, that they should be protected, under the principle that when one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss. Civil Code, § 3940. The statute made no direct requirement of a reconveyance for one who redeems land sold at a tax sale prior to 1898. Acts 1898, p. 85. It seems doubtful whether that act applies to wild land, as it refers to redemptions within one year. Probably the owner could have obtained a cancellation by a proceeding in equity on the ground that the recorded tax deed constituted a cloud on his title. 2 Cooley on Taxation (3d ed.), 1447-1449. But the failure to do so was not such an act on his part as brought him within the legal principle relied on. He did not voluntarily make the conveyance to the purchaser, nor do anything except fail to pay his taxes. It is alleged in the answer that the owner redeemed the land within the time prescribed by law and received possession of the tax deed. In view of what has been said above in regard to the law in relation to tax sales, we do not think that the mere failure to demand a reconveyance or to proceed in equity to have the recorded deed canceled was such conduct on his part as would prevent him from showing that there was in fact a cancellation within the time prescribed by law. Neither party appears to have been in actual possession of the land, except as evidenced by the cutting of timber, etc., for a time by persons acting under the original owner, and the purchaser at the tax sale had no other indicia of ownership than the tax deed. Had there been

possession by those claiming under the tax deed, a title by prescription might have ripened. *Greer v. Fergerson*, 114 Ga. 552.

We are of opinion that the court erred in striking the portions of the answer which set up the defense indicated, and in refusing to admit evidence in support thereof.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

LANIER, HAMILTON & COMPANY v. HEBARD *et al.*

1. A power of attorney authorizing a designated person, as attorney in fact, to sell and convey all the lands, situated in the State of Georgia, belonging to the donors of the power, or in which they have any interest, or any part of such lands, is not inadmissible in evidence because it fails to describe the lands "by county, number, or district."
2. Upon the interlocutory hearing of an application for injunction, brought under the Civil Code § 4927, it is not erroneous to admit in evidence a paper offered by the plaintiff as a link in his chain of title, and objected to as being irrelevant, although at the time such paper is offered in evidence it does not appear to be admissible as such, if its admissibility depends upon facts which it is competent to establish by subsequent evidence. But such paper should only be admitted subject to the objection made; and if evidence showing its relevancy to the issue on trial is not afterwards introduced, it should be either expressly ruled out or treated by the judge as of no probative value.
3. Recitals in an ancient deed, wherein the party executing it purports to convey the property for himself and, as attorney in fact, for others as the heirs at law of a former owner, that such former owner is dead and the grantors are such heirs, unsupported by other evidence showing the relationship of the party making such recitals to the person whose heirs at law the grantors are in the writing claimed to be, or by proof of uninterrupted possession, under such deed, for such length of time as to raise a presumption that such recitals are true, are not sufficient to prove the facts so recited.
4. As the plaintiffs not only failed to prove the perfect paper title contemplated by the Civil Code § 4927, but also failed to prove any title at all to the premises in controversy, they were not entitled to an injunction, even if they showed that the threatened damage would be irreparable, or that the grant of the writ would prevent a multiplicity of suits.

Argued June 21, — Decided August 2, 1905.

Injunction. Before Judge Parker. Clinch superior court. January 30, 1905.

Charles S. Hebard and others filed an equitable petition against I. G. Lanier, C. T. Hamilton, and Daniel J. Guy, partners under the name of Lanier, Hamilton & Company, to enjoin the defend-

ants from working for turpentine purposes trees on lots of land numbers 328 and 329 in the 12th district of Ware county. The plaintiffs sought to bring their case within the scope of section 4927 of the Civil Code, which relieves an applicant for injunction, in a case of this character, of the necessity of averring and proving insolvency of the defendant, or that the threatened damages would be irreparable, or other circumstances rendering the issuance of the writ of injunction necessary and proper, by attaching to their petition an abstract of title, claimed to be a "perfect title" to the land and the timber in question. This abstract was as follows: (1) Grants from the State to Benjamin G. Barker, dated July 8, 1858, to lots 328 and 329 in the 12th district of Appling county (but now of Ware county). (2) "Power of attorney, dated December 8th, 1871, from heirs at law of Benjamin G. Barker to William B. Van Benschoten, signed by John Van Benschoten, Edward Van Benschoten, Sarah Van Benschoten, Edwin Mills and Elizabeth Mills." (3) "Deed dated December 22nd, 1871, from William B. Van Benschoten under said power of attorney, for the heirs at law of said Benjamin G. Barker, to J. M. Stiger, conveying the lands in question and other lands. (4) Deed dated April 27th, 1901, from J. M. Stiger to R. R. Hopkins," conveying lands in question and other lands. (5) Deed dated July 17, 1902, from R. R. Hopkins to the plaintiffs, conveying the lots in controversy and other lands. The defendants were not alleged to be insolvent. There was an allegation to the effect that working the timber on the lands in question by defendants for turpentine purposes would cause irreparable damage to plaintiffs, for the reason that plaintiffs had purchased such lands, together with a large body of land known as the Okefenokee Swamp, for the purpose of manufacturing the timber thereon into lumber when they should see proper so to do; that such timber was very valuable and constituted the principal value of the land; that the working of the timber for turpentine purposes would cause it to be destroyed, and plaintiffs would be deprived of the profits they expected from its manufacture into lumber. It was further alleged that the acts of trespass complained of were continuing from day to day, and, unless defendants were enjoined, plaintiffs would be involved in a multiplicity of suits at law against defendants for the recovery of

damages. It was also alleged that defendants had cut, felled, hacked, and boxed ten thousand of the trees on the two lots of land, to plaintiffs' damage in the sum of three thousand dollars, for which a recovery was prayed. The defendants demurred to the petition, on the grounds that it set up "no reason in equity which [entitled] the plaintiffs to an injunction," and that the abstract of title attached to the petition did not authorize the granting of an injunction, in the absence of insolvency of defendants or irreparable damage to plaintiffs. The defendants also answered, denying the material allegations of the petition.

On the interlocutory hearing the plaintiffs introduced the following evidence: Plats and grants from the State to Benjamin G. Barker, dated July 8, 1858. "A power of attorney dated November 6, 1871, from E. B. Scattergood, Theodore Scattergood, I. Scattergood, Robert Smith, Helen C. Smith, and Sarah Barker to William B. Van Benschoten, containing the following powers: 'to enter into and take possession of all real estate belonging to us or in which we or either of us have any interest, situated in the State of Georgia, and to bargain, sell, grant, convey, and confirm the whole or any part thereof for such price or sum of money, and on such terms, as he may think best, and to sell or exchange the same for other property as he may think best.'" (3) The power of attorney from John Van Benschoten et al. to William B. Van Benschoten, dated December 8, 1871, being the same as set out in the abstract of title attached to the petition, the powers delegated being the same as those in the power of attorney from Scattergood et al. to William B. Van Benschoten. (4) "A [warranty] deed from William B. Van Benschoten and Julia A. Van Benschoten, his wife, to J. M. Stiger, to which the said William B. Van Benschoten purported to sign for himself and as attorney in fact for the heirs of Benjamin G. Barker, executed on the 22nd day of December, 1871, and conveying, among a great many lots of land in various counties," the two lots of land in question, and reciting that the lands conveyed embraced "in all 21,560 acres, be the same more or less," and further reciting: "said premises having formerly belonged to the estate of Benjamin G. Barker, deceased, and are herewith conveyed and intended to be conveyed by the said William B. Van Benschoten in his own right and by several

powers of attorney, dated November the 6th, 1871, and 8th of December, 1871, so far as the rights of other heirs and representatives of said Benjamin G. Barker are or may be concerned."

(5) A deed from J. M. Stiger to R. R. Hopkins, and a deed from R. R. Hopkins to the plaintiffs, to the lands in question and other lands. (6) Affidavit of J. M. Stiger, that he had purchased from William B. Van Benschoten, as attorney in fact for the heirs at law of Benjamin G. Barker, certain real estate, including the two lots of land in controversy; that he had remained in the uninterrupted, quiet, peaceable, adverse, and notorious possession of said two lots of land until he conveyed them to R. R. Hopkins; that his "ownership and possession of above lots extended over a period of twenty years; during all of this time [he] paid taxes levied upon and assessed against these two lots of land, and that during the last twenty years of [his] ownership [he] had houses, fences, and buildings and improvements upon certain of the lands described in the deed from William B. Van Benschoten to [him]; and that [his] acts of ownership and possession extended over and embraced all of said property described in this deed from William B. Van Benschoten to [him] during said period." (7) Affidavit of R. R. Hopkins, to the effect that the trespass complained of would be of irreparable injury to the plaintiffs, in the manner set out in the petition. (8) Affidavit of W. H. Mizell, that defendants had cut ten thousand of the trees standing on the two lots in question, to the injury of the plaintiffs in the sum of three thousand dollars. Defendants submitted in evidence the affidavits of several witnesses to the effect that defendants had not cut the boxes in the trees on the two lots in question, but had merely worked them by hacking the boxes and dipping the gum therefrom, and that this did not increase the damage already done by boxing the trees; and that the damage thus done the defendants was not irreparable, but of easy computation; and that neither J. M. Stiger nor any one claiming under or through him has ever been in possession of the two lots in controversy, or any land contiguous thereto, "by inclosures, cultivation, residence, tenants, or otherwise, or by working the timber for any purposes." They further deposed that the lands conveyed by Van Benschoten and wife to Stiger "do not constitute one body

and tract of land, and is not composed of entire adjacent or contiguous lots or tracts, and that there are no improvements or possession of any kind on said land."

The court granted an order enjoining defendants as prayed for, until the final hearing. To this order the defendants excepted.

R. G. Dickerson and S. L. Drawdy, for plaintiffs in error.

Krauss & Shepard and Toomer & Reynolds, contra.

FISH, P. J. (After stating the facts.) 1. The defendants objected to each of the powers of attorney to William B. Van Benschoten, when it was offered in evidence, because it "failed to describe the land described in plaintiffs' petition by county, number, or district;" and upon the further ground that it did not in any way connect Benjamin G. Barker with the parties creating the power of attorney, and no evidence was offered by the plaintiffs connecting such parties with Benjamin G. Barker and showing that they were his heirs at law. Another ground of objection made was abandoned in this court. There was no merit in the first ground, as the power given covered all the real estate belonging to the donors in this State, wherever situated.

2. The second ground of objection was meritorious, unless the plaintiffs by subsequent evidence removed it; as, at the time the objection was made, there was absolutely nothing in evidence which tended to show that the parties executing either of these papers had derived title in any way from Benjamin G. Barker, the grantee of the State. The plaintiffs sought to show that the parties creating these powers of attorney were the heirs at law of Benjamin G. Barker, by certain recitals contained in the deed from William B. Van Benschoten and wife to J. M. Stiger, this deed being more than thirty years old. This was the next piece of evidence introduced, the probative value of which will be considered later. The judge was not bound to sustain the objection to the powers of attorney at the time when it was made, especially as the case was before him at chambers, but could properly admit them, subject to be ruled out, unless their relevancy was shown by subsequent evidence. We shall presently come to the real, substantial error which he committed, which renders the ruling just discussed of but little or no importance and requires a reversal of the case upon its merits.

3. We think it is clear that the plaintiffs failed to prove a perfect title as contemplated by the Civil Code, § 4927. To authorize the granting of an injunction under this section, "the plaintiff must show a perfect title upon the face of the papers presented by him and constituting his chain of title. If such papers do not show upon their face a perfect title, aliunde evidence will not be admitted to explain any defects in the title apparent upon the face of the papers," *Camp v. Dixon*, 111 Ga. 674, 676; *Wiggins v. Middleton*, 117 Ga. 162, and cit. Counsel for the plaintiffs contend that they did prove such perfect paper title by a chain of title from the State down to the plaintiffs, which they introduced in evidence. One link in this chain of title was the deed from William B. Van Benschoten and wife to J. M. Stiger, wherein said Van Benschoten purported to convey, for himself and for others, as heirs at law of Benjamin G. Barker, the lands in question to such grantee. This link was fatally defective, in that it was not shown that the parties for whom Van Benschoten undertook to convey the lands to Stiger were the heirs at law of Benjamin G. Barker. As we have intimated, counsel for the plaintiffs rely upon certain recitals in this deed to establish this fact. They insist that as the deed is an ancient one, the recitals therein are to be taken as true; and that these recitals, so considered, show that the persons in whose behalf the deed was made were the heirs at law of Benjamin G. Barker. The recitals relied on are as follows: "said premises having formerly belonged to the estate of Benjamin G. Barker, deceased, and are herewith conveyed and intended to be conveyed by the said William B. Van Benschoten in his own right and by several powers of attorney dated November 6th, 1871, and 8th of December, 1871, so far as the rights of other heirs and representatives of said Benjamin G. Barker are or may be concerned." It will be noted that it is only indirectly and inferentially declared here that William B. Van Benschoten is an heir at law of Benjamin G. Barker, and that who were the "other heirs and representatives of said Benjamin G. Barker," for whom he was acting, is not stated. It will be observed also that there is no direct and explicit statement that the makers of the deed are all the heirs at law of Benjamin G. Barker. Admitting, however, for the sake of the argument, that these recitals, taken in connection with the

two powers of attorney introduced in evidence, the dates of which, respectively, correspond with the dates of the powers of attorney here mentioned, can be considered as a declaration by William B. Van Benschoten that he and the parties signing such powers of attorney are the heirs at law of Benjamin G. Barker, is this declaration by him, when found in an ancient deed which he executed, sufficient, in and of itself, to prove that he and the other persons for whom he acted in executing the deed were the heirs at law of Benjamin G. Barker? We think not.

In *Dixon v. Monroe*, 112 Ga. 158, it was broadly held: "A recital in a deed that the parties making it are heirs at law of a former owner is no evidence of the fact, except as against parties to the deed and their privies." The same ruling was made in *Hanks v. Phillips*, 39 Ga. 550, and *Yahoola Co. v. Irby*, 40 Ga. 479. In none of these cases, however, was the deed containing the recital an ancient deed. In *Yahoola Co. v. Irby*, McCay, J., said: "We see no reason why the recital in a deed by John and Jacob Doe, that they are the heirs-at-law of William Doe, should be evidence of that fact. Any other two men might make a deed with the same recital in it, and there would be no reason why the recital in one of the deeds should be taken for true rather than in the other. To make out a title to land, all that would be necessary, if this were the law, would be to write a deed to it, setting forth that the maker of the deed was the heir-at-law of the true owner." *Carver v. Astor*, 4 Peters, 83, was cited, wherein it was held that the general rule is, "that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties, by title anterior to the date of the reciting deed. . . . But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease, in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease, in such release, is not per se evidence of the existence of the lease. But if the existence and loss of the lease

be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which can not otherwise be explained; and under such circumstances, a recital of the fact of such a lease, in an old deed, is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession." It is somewhat significant that Judge McCay, though citing that case, did not except ancient deeds but announced the broad and unqualified rule that "a recital in a deed that the parties making it are heirs-at-law of a former owner is no evidence of the fact recited, except as against parties to the deed and 'their privies.'" And the reasons, above quoted, which he gave to sustain the ruling, are as applicable to a recital in an ancient deed as to one in a recent deed. In a few courts a recital in an ancient deed of a pedigree of inheritance has been held admissible to show the state of the relationship; but the great weight of judicial authority is to the effect that before such a recital, even in an ancient deed, can be considered as evidence of relationship, possession of the premises under the deed, or other corroborative circumstances, must also appear. 2 Wigmore on Ev. § 1573 (3), and cases cited in note 7.

The rule, as we understand it to be established by the great weight of outside authority, is, that before the recitals in an ancient deed, of the death of the former owner and of the relationship of the grantor to him, can be taken as evidence of the facts recited, there must be evidence of the death of the person making the recital or declaration and that he was de jure related by blood or marriage to such former owner, or proof of undisturbed possession, under the deed, of the premises conveyed for such a length of time as to raise a presumption that such recitals in the deed are true. While the rule seems generally recognized that in matters of pedigree the declarations of

deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence, yet before such a declaration can be received in evidence the relationship of the person making it with the family must be established by some proof independent of the declaration itself. There is absolutely no evidence disclosed by the record in this case which shows that William B. Van Benschoten, who made the recitals in this deed, which are relied on by the plaintiffs, was dead when the case was tried. Nor is there any evidence, other than his own written declaration, that he was in any way related to Benjamin G. Barker. Therefore his written declaration, that he and the other persons for whom he acted were the heirs at law of said Barker, stands upon no higher footing than such a declaration made by one who was in no way related to Barker. This being true, it is unnecessary to inquire whether, if these facts had been shown, his declaration that the grantors were the heirs at law of Barker would have been admissible. In this connection we will, however, say that the declaration in question seems to be more the statement of a legal conclusion from facts undisclosed, than a statement of the real relationship of the grantors to Barker. There was no proof, as we will later show, that possession of the lots, or either of them, was held for any length of time under the deed to Stiger; and even if there had been proof of such possession of the lots, or either of them, for such length of time as to raise a presumption that the recital that the grantors were the heirs at law of Benjamin G. Barker was true, such proof would necessarily have had to be made by aliunde evidence, which, under the ruling in *Camp v. Dixon*, supra, would not be admissible for the purpose of bringing the plaintiffs' case within the provisions of the Civil Code, § 4927, as such evidence could not be received to explain defects in the title apparent upon the face of the papers. Our conclusion, therefore, is that the plaintiffs did not show the "perfect title" which will, under this section of the code, relieve an applicant for injunction from the necessity of averring and proving insolvency of the defendant, or that the threatened damage will be irreparable, or other circumstances rendering the interposition of the writ necessary and proper.

4. The plaintiffs not only failed to prove a perfect title, but

proved no title at all to the land or timber in question. While Stiger's affidavit was that he remained in the uninterrupted, quiet, peaceable, adverse, and notorious possession of lots 328 and 329 until he sold and conveyed the same to Hopkins, and his (Stiger's) ownership and possession of these lots extended over a period of twenty years, during all of which time he paid taxes on them, and that during the twenty years of his ownership he had houses, fences, buildings, and improvements placed upon certain of the lands described in the deed from William B. Van Benschoten to him, and that his acts of ownership and possession extended over and embraced all of the property described in this deed, it is very clear that he was only swearing to his own conclusion. The deed to him embraced some 21,560 acres of land, consisting of lots containing 490 acres each, and situated in as many as five different counties; and the payment of taxes on all of the lands embraced in the deed and the actual possession of one or more of the lots, other than 328 and 329 in Ware county or some one of the other lots which was contiguous to these, was not even constructive possession of such two lots. The undisputed evidence is that there was no actual possession of the two lots in question, or of any lot conveyed in the deed contiguous to these lots. It follows, therefore, that even if the threatened injuries would be irreparable or if the plaintiffs would be saved the necessity of a multiplicity of suits, they were not entitled to an injunction, because they failed to prove title to the land or timber in question.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

BIGBY, executrix, v. DOUGLAS, administrator, et al.

1. At common law, where one surety paid off the principal's debt, or more than his share, he could compel contribution from his cosureties. Civil Code, § 2902, is but a codification of this principle of the common law, and is not of statutory origin.
2. The surety entitled to contribution may sue his cosureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class), or upon the implied contract raised by law in favor of one surety against his cosureties for contribution (in which instance the period of limitation would be that of an implied assumption).

123	635
124	625
123	635
125	730

8. Civil Code, § 3766, which provides that "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues," is applicable to cases where the liability thus created is in favor of an individual, or a class to which he belongs, as distinguished from one arising under the general law in favor of the public at large.

Argued June 21, — Decided August 2, 1905.

Action for contribution. Before Judge Lumpkin. Fulton superior court. August 12, 1904.

On the 11th day of February, 1904, Mrs. Elizabeth Kate Bigby, as executrix of the last will and testament of John S. Bigby, brought suit against Hamilton Douglas, as administrator of the estate of J. T. Warnock, and S. Eberhart and A. J. Bethune, alleging, in substance, that her testator and J. T. Warnock, S. Eberhart, and A. J. Bethune were joint accommodation indorsers on a certain promissory note given by the Eagle & Phoenix Manufacturing Company to the National Bank of the Republic, of New York City, for the principal sum of \$40,000, dated June 1, 1894, and payable on demand; that on the 13th day of May, 1896, the holder of the note demanded payment of the maker, and, upon refusal to pay, the note was protested in the manner and form prescribed by law, and due notice given to the indorsers; that on the 16th day of May, 1896, plaintiff's testator transferred certain shares of bank stock to the payee of the note, as additional security for the indebtedness, the stock being the individual property of plaintiff's testator and being transferred by him on account of his liability as indorser; that subsequently, in December, 1898, the National Bank of the Republic, the payee and owner of the note and pledgee of the bank stock, sold the stock under a power of sale conferred upon it, and applied the proceeds to the satisfaction and payment of the \$40,000 note; and that, because of this payment, Warnock, Eberhart, and Bethune became liable to plaintiff's testator to contribute their pro rata share of the amount of the note by virtue of their legal obligation so to do as indorsers of the note. The plaintiff prayed judgment against each of the defendants for his pro rata share of the joint indebtedness which had been discharged by her testator in the manner above stated. To this declaration the defendants filed their several demurrers upon the ground, amongst others, that any cause of action which may have accrued by

reason of the facts alleged was barred by the statute of limitations. The court sustained this ground of demurrer and dismissed the plaintiff's action, and the bill of exceptions sets forth an assignment of error upon this judgment.

Anderson & Anderson and *A. H. Cox*, for plaintiff. *Slaton & Phillips, Hatcher & Carson*, and *J. H. Martin*, for defendants.

EVANS, J. (After stating the facts.) It is well-settled law in this State that an accommodation indorser is to be considered as a mere surety. Civil Code, § 2969. The plaintiff's petition presents a case of the payment by one accommodation indorser of the principal debt to the creditor, and a claim for contribution from the other indorsers. It is insisted by the plaintiff in error that the cause of action set forth in the petition is predicated neither upon the subrogation of her testator to the rights of the payee of the note, nor upon any implied contract on the part of the defendants to make contribution, but upon their statutory liability so to do, arising under the Civil Code, § 2992, which declares that: "Where several are sureties for the same principal, for the same sum of money, either by one or by distinct instruments, and one pays more than an equal share of the sum, he may compel contribution from his cosureties. If one of the cosureties be insolvent, the deficiency in his share must be borne equally by the solvent sureties." The payment of the joint indebtedness by one of several sureties entitles him to sue his cosureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class), or to sue upon the implied contract raised by law in favor of one surety against his cosureties for contribution (in which instance the period of limitation would be that of an implied assumpsit). *Hull v. Myers*, 90 Ga. 674. Admittedly the plaintiff is barred by lapse of time from pursuing either of these remedies. But it is contended that the right of a surety to compel contribution from his cosureties is a statutory right, and therefore, under the Civil Code, § 3766, the cause of action is not barred. That section provides that "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues." The evident purpose of this section is to fix a period of limitation for special cases not provided for by

the general statute of limitations, or otherwise, where rights accruing to "individuals" are sought to be enforced. A statutory liability is one that depends for its existence upon the enactment of a statute, and not upon the contract of the parties. *Pare v. Mahone*, 32 Ga. 253. The right of one surety to compel contribution from a cosurety, recognized and declared in the Civil Code, § 2992, is not of statutory origin. The section of the code just cited is a mere codification of the common law. As was pointed out in *Lumpkin v. Mills*, 4 Ga. 343, under the common law, as understood and applied prior to the time of the Revolution, where a surety paid off a debt, he was subrogated to all the rights of the creditor upon the evidence of indebtedness, and was entitled to an assignment of the security to enable him to obtain satisfaction for what he had paid beyond his own just proportion. See also *Irby v. Livingston*, 81 Ga. 283.

But conceding that a new right was created in favor of the surety by the adoption of the code section last mentioned, still the enforcement of that right must be within the period of limitations applicable to causes of action which arise by implication of law from the contractual relations existing between parties to an obligation which they have voluntarily assumed. The provisions of section 3766 were not intended to apply to a case such as that now under consideration. To construe it as referring to every right conferred by statute or accruing "by operation of law," and to stick to its letter as thus interpreted, would be to nullify other sections of the code fixing the period within which an aggrieved party shall bring an action in assumpsit or one for damages arising out of the violation of or failure to perform a legal duty imposed upon another under the common law or by statute. In *Harris v. Smith*, 68 Ga. 461, the provisions of this section were held not to apply to an action in assumpsit brought by a defendant in fl. fa. against a sheriff for the balance of funds in his hands after paying off the fl. fa. under which he had sold property belonging to the defendant in execution; and Mr. Justice Crawford said (page 463): That the act of which this section is a codification "does not apply to the case before us, we think very clear; if, indeed, it were made so to apply, we are at a loss to see where it would stop; for every right to recover arises in some way by operation of law; and if we stick to the letter of this act, there would be

but few cases barred by the statute of four years." As he also pointed out, "the legislature was dealing with rights accruing to individuals under statutes and acts of incorporation, the latter of which, especially about the date of the passage of the act, had given rise to great litigation in the State. In some of the cases growing out of both statutory and charter liabilities of parties, it was held that obligations arose which were '*quasi ex contractu*, and imposed by operation of mere law.' *Banks vs. Darden*, 18 Ga. 341." So the conclusion announced by the court was that: "Looking at the act and the judicial decisions of the times, it would seem that these words ["by operation of law"] were intended to apply to such rights as arise in connection with, though not strictly under, the very words of the statutes or acts of incorporation." In other words, the General Assembly had in contemplation rights conferred by law upon particular individuals, and not upon the general public, because they sustained a peculiar relation to the incorporators of certain chartered institutions or were by special enactment given privileges in return for services to be performed by them for the benefit of the public, or were for some other reason entitled to enforce rights which they did not share in common with their fellow-citizens. The rights referred to were such as could be asserted by certain persons, not in their capacity as members of the public who came within the protection of a general law, but as particular "individuals" who were by special enactment expressly designated by name, or who belonged to a designated class to the members of which, but to none others, such rights might accrue "under statutes, acts of incorporation, or by operation of law." With these strictly personal rights the public at large has no concern. To rights which are conferred by law upon members of the public at large, as such, section 3766 has no application. That this is true was recognized in the case of *Savannah Canal Co. v. Shuman* 98 Ga. 171, wherein Chief Justice Simmons said (page 173): "In order to bring the case within this section, the liability would have to be one expressly created in favor of an individual or a class to which he belongs, as distinguished from one arising under the general law in favor of all persons who might be injured by a breach of the corporate duty" imposed upon the canal company. In that case the plaintiff made complaint that the defendant did not keep its canal in such condi-

tion as to enable him to transport his lumber and wood over it in boats; and he sued for damages sustained by reason of its breach of public duty. The trial court held that the provisions of the code section last cited applied to the cause of action, and it was not barred because suit was not brought within four years from the time the right of action accrued; but this court took the opposite view, holding that the twenty-year period of limitation did not apply. In the present case the court below held that the right of a surety to contribution was not one of statutory origin; that the provisions of the Civil Code, §2992, were a mere codification of the common law; that the remedy of the plaintiff's intestate, on paying off the joint indebtedness, was either on the note or on the implied assumpsit: and that therefore the cause of action was barred. We concur in this interpretation of the law; and the judgment sustaining the demurrer is

Affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

BASS DRY GOODS COMPANY v. ELECTRIC STORAGE BATTERY COMPANY.

Where a certiorari was sustained because all the evidence submitted by the defendant in certiorari on the trial of the case before the magistrate was inadmissible, it was not error for the judge of the superior court to refuse to render a final judgment, and to remand the case for a new trial.

Argued June 22,—Decided August 2, 1905.

Certiorari. Before Judge Lumpkin. Fulton superior court. September 7, 1904.

Dodd, Newman & Dodd, for plaintiff in error.

Mayson, Hill & McGill, contra.

FISH, P. J. The Electric Storage Battery Company sued the Bass Dry Goods Company, in a justice's court, upon a contract and open account, and obtained judgment. The defendant carried the case to the superior court by certiorari, alleging that the judgment was contrary to law, because the magistrate had admitted in evidence certain interrogatories which had not been properly executed and other inadmissible documentary evidence (which con-

stituted all the evidence submitted by the plaintiff), and asked that the court render a final judgment in its favor. The judge sustained the certiorari on the ground that the plaintiff's evidence was inadmissible, but remanded the case for a new trial; and the defendant excepted.

In the case of *Seaboard Air-Line Railway v. Blue*, 120 Ga. 228, it was held: "When the only error alleged in a petition for certiorari is that the verdict therein complained of is contrary to law and to the evidence, and it appears that the evidence demanded a verdict for the plaintiff in certiorari, the superior court should, of course, sustain the certiorari; but it would be erroneous in such a case, *though there be no conflict in the evidence*, to render a final judgment in his favor. This is so for the reason that in such a case the error complained of is not 'an error in law which must finally govern the case,' and further, because it could not be known with certainty that the evidence on another trial would be the same;" citing *Holmes v. Pye*, 107 Ga. 784; *Ala. Great Southern R. Co. v. Austin*, 112 Ga. 61; *Williams v. Bradford*, 116 Ga. 705. As the present record does not make a case "where the error complained of is an error of law which must finally govern the case," but only the erroneous admission of certain evidence which made out the plaintiff's case, the trial judge did not err in remanding the case to the justice for a new trial. Granting that had the magistrate refused to admit the evidence of the plaintiff, which the superior court held inadmissible, a verdict would have been demanded for the defendant in the absence of further evidence by the plaintiff, still the judge did not err in declining to render a final judgment, for he could not have known that in the event of such ruling by the justice the plaintiff would not have been able to have sustained its case with other and admissible evidence; and further, "because it could not be known with certainty that the evidence on another trial would be the same."

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

SOUTHERN RAILWAY COMPANY *v.* HENRY.

CANDLER, J. This was an action for damages against a railroad company for the killing of cattle, and was appealed by the defendant from a justice's court to a jury in the superior court. The jury returned a verdict for \$50 in favor of the plaintiff; and the defendant moved for a new trial, solely on the grounds that the verdict was contrary to law and the evidence. It was not denied that the defendant's train ran over the cattle. The evidence as to the circumstances of the killing was conflicting, but that for the plaintiff was sufficient to warrant a finding that if ordinary diligence had been used by the engineer in charge of the train he could have discovered the presence of the cattle on the track and have stopped the train in time to have avoided striking them. The judge of the superior court expressed his satisfaction with the verdict by overruling the motion for a new trial, and that judgment will not be disturbed.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

Argued June 22, —Decided August 2, 1905.

Action for damages. Before Judge Lumpkin. Fulton superior court. September 29, 1905.

P. H. Brewster Jr., and L. C. Rucker, for plaintiff in error.
Loundes Calhoun, contra.

VEAL *v.* HANLON.

- EVANS, J. 1. By the statute law of this State, a landlord is bound to keep in repair premises which he has rented to another. Civil Code, §§ 3118, 3123.
2. If, after notice of the defective condition of the premises and after the lapse of a reasonable time in which to make the needed repairs, the repairs are not made, the landlord will be liable to the tenant or a member of his family for damages occasioned by the disrepair of the premises, if the injured party's own negligence did not bring about the injury.
3. In an action by the wife of the tenant against the landlord for personal injuries alleged to have been occasioned by the defendant's failure to keep in repair the steps to the house, the granting of a nonsuit is proper when the evidence for the plaintiff affirmatively shows that she had knowledge of the defect in the step and of its dangerous condition, and might, by the exercise of ordinary care, have avoided injury.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued June 24, —Decided August 2, 1905.

Action for damages. Before Judge Calhoun. City court of Atlanta. October 28, 1904.

Burton Smith, and J. A. Branch, for plaintiff.
Arnold & Arnold, for defendant.

SIMS v. GEORGIA RAILWAY AND ELECTRIC CO.

After a trial judge has formally overruled a demurrer to a petition, holding that upon the facts stated in the petition the defendant is liable in damages to the plaintiff, it is not within the power of the judge, at a subsequent term of the court, to review or revise such ruling; and if no exception thereto be taken by the defendant, but it stands unreversed when the case is ripe for a trial on the merits, the trial judge should not, in his charge to the jury, give to the defendant the benefit of the defense set up in the demurrer, since the questions thereby raised are *res adjudicata*, and the court can not by indirection deprive the plaintiff of the estoppel he is entitled to urge as against the defendant.

Argued June 26, — Decided August 2, 1905.

Action for damages. Before Judge Reid. City court of Atlanta. November 5, 1904.

This was a suit for damages, brought by E. F. Sims against the Georgia Railway and Electric Company upon the following state of facts: Plaintiff boarded one of the cars of the company at the corner of Broad and Marietta streets in the city of Atlanta, with a view to going to a point on the south side of the city. He gave to the conductor a quarter of a dollar in money of the United States, which was all the change he had with him, and the conductor returned to him two five-cent pieces and one ten-cent piece. The ten cent-piece was, as the plaintiff subsequently discovered, a Canadian coin. He left the car when he arrived at his destination, and later in the afternoon of the same day boarded another car for the purpose of returning to the center of the city. When the conductor in charge of this car came to him to collect fare, he gave the conductor this Canadian coin, having spent his other change. The conductor took it from him, and then in a most abrupt, offensive, and boisterous manner, and in a loud tone of voice, told plaintiff the money was counterfeit, and accused him of trying to pass it off as good money. Plaintiff tried in vain to explain that it was not counterfeit, but simply a Canadian coin, and that another of the company's conductors had given it to him the same afternoon; that it was all the change he possessed, and if it was not good, he would make it good. Plaintiff also told the conductor what was his business address. The conductor refused to accept this explanation, and while he did not put plain-

tiff off the car or threaten to do so, he still demanded other money and kept quarreling about the matter until the car arrived at the corner of Whitehall and Alabama street, at which point the car stopped and plaintiff endeavored to alight. The conductor stopped him in a most abrupt manner, placed him under arrest, and turned him over to a policeman, much to his inconvenience, embarrassment, and humiliation, as there were ladies and gentlemen on the car whose attention and curiosity were aroused by the conductor's abusive treatment of him, and at the time the conductor arrested him and turned him over to the policeman quite a crowd was present and observed what occurred. The suit was returnable to the March term, 1903, of the city court of Atlanta, at which term the presiding judge passed on and overruled a demurrer to the petition which had been filed by the defendant company. No exception was taken to the judgment overruling its demurrer. On October 10, 1904, during a subsequent term of the court, the case was tried on its merits, and resulted in a verdict in favor of the company. The plaintiff made a motion for a new trial, but the court declined to set the verdict aside, and he excepted.

Alonzo Field and A. M. Brand, for plaintiff. *Rosser & Brandon, W. T. Colquitt, and B. J. Conyers*, for defendant.

EVANS, J. (After stating the facts.) The objections to the plaintiff's petition raised by the defendant company's demurrer were, (1) that it was immaterial whether one of its conductors had or had not given to him the Canadian coin which he tendered to the conductor of the car which he boarded for the purpose of returning to the center of the city; (2) that the facts recited were not such as to render the company liable to the plaintiff as a passenger for the abusive treatment of its conductor in charging him with endeavoring to pass a counterfeit coin; and (3) that the company could not be held legally responsible for the act of the conductor in placing the plaintiff under arrest, the petition not alleging that the "defendant company authorized said arrest or had any part in having the same made." The right of the plaintiff to recover upon proof of the allegations made in his petition was adjudicated favorably to him by the judgment overruling the demurrer. "Until duly set aside, that decision is conclusive, and the question thereby settled is to be regarded as *res adjudicata*."

Hollis v. Nelms, 115 Ga. 7. In this judgment the defendant company acquiesced, neither filing exceptions pendente lite nor bringing it under review by a direct bill of exceptions to this court. On the trial of the case, therefore, the only question for determination was the amount of the damages suffered by the plaintiff, in the event he sustained by proof the allegations of fact on which he based his right of recovery. *Richmond Hosiery Mills v. W. U. Tel. Co.*, 123 Ga. 216. The defendant company was precluded from calling into question the right of the plaintiff to recover upon such proof being made. *Ga. Northern Ry. Co. v. Hutchins*, 119 Ga. 504. As was remarked by Mr. Justice Cobb in *Kelly v. Strouse*, 116 Ga. 891-892, "If the defendant calls in question the sufficiency of the petition by demurrer, as he has a right to do, and the court renders an erroneous decision holding that the petition sets forth a cause of action, when in truth it does not, and the defendant acquiesces in this decision, of course no one will contend that, after the time allowed by law has expired for bringing under review this erroneous decision, the defendant can be heard to say that the petition sets forth no cause of action." When a case is in limine, the trial judge may of his own motion interpose to prevent a miscarriage of justice, provided "there is no estoppel of which either party may take advantage." *Ibid.* 874. But it is not within the power of the trial judge to give to either party the benefit of a contention which he is himself estopped to urge. Thus, in *McCandless v. Conley*, 115 Ga. 48, it was held that "Where an amendment to pleadings has been, in term, duly allowed, it is not, after the term has expired, within the power of the court to revoke the order of allowance and strike the amendment on the ground that it was in the first instance erroneously allowed." During the term of the court at which a judgment is rendered, it is within the breast of the presiding judge and may be vacated upon proper cause shown; but after the term has expired, the judgment "is upon the roll" and is not subject to review or revision by the trial court. 1 Black, Judg. § 157.

Applying to the present case the well-settled principles of law above stated, we are of the opinion that the court erred in not granting the plaintiff a new trial. The plaintiff presented a written request to charge to the effect that if one of the company's

conductors gave to the plaintiff the Canadian coin which he tendered as fare, the conductor to whom it was offered was bound to accept it as legal tender. The judge declined to charge as requested; and instructed the jury that if the plaintiff did not enter the incoming car of the defendant company prepared to pay his fare in lawful currency of the United States, he would not occupy the position of a passenger. The jury were further instructed, in effect, that the company could not be held liable in damages for the act of its conductor in placing the plaintiff under arrest, unless the conductor was acting within the scope of the authority expressly conferred upon him by the company and it was contemplated by his master that he should make such an arrest. The court declined to give a charge requested in writing by the plaintiff's counsel, in which the proposition was stated that if the conductor took hold of the plaintiff and turned him over to a policeman while engaged in the performance of the company's business and in the line of his duty, because of the non-payment of fare and because he refused to accept the Canadian coin as fare, then the company would be responsible for the conduct of its conductor. The requests to charge were in accord with the theory of liability upon which the plaintiff's petition was framed; the instructions which the court gave to the jury practically precluded the plaintiff from a recovery under the evidence submitted. Irrespective of whether or not the plaintiff's petition set forth a cause of action, he was, as the court had adjudged in passing on the company's demurrer, entitled to damages upon making proof of the allegations of fact upon which he relied for a recovery. It was not within the power of the trial judge to review his ruling upon the demurrer, or, by indirection, give the company the benefit of a defense which it had thereby urged, since it had acquiesced in the decision of the court that there was no merit in any of the objections to the petition which the company urged by way of demurrer. The court did not err in refusing to allow the plaintiff to prove the value of the Canadian coin which he tendered as fare. Its value, if any it had, was immaterial, even upon his theory of the case, as he took the position that the company was responsible for his having no other money with which to pay his fare, and therefore could not set up the defense that he was not prepared to pay his fare in lawful

currency of the United States. As to the right of the plaintiff to recover, irrespective of the judgment rendered on the demurrer to his petition, we express no opinion. The important fact is that this question is *res adjudicata*, as the plaintiff insisted in his motion for a new trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

COMMISSIONERS OF MCINTOSH COUNTY *v.* AIKEN
CANNING COMPANY.

1. Where in a civil case the party proceeded against is designated and described by a wrong name, the objection of misnomer should be taken by a plea in abatement, and not by a motion to dismiss.
2. Where in such a case the party defendant, whether a corporation or a natural person, appears and pleads to the merits by the true name without raising the objection of misnomer the error as to the name of such party is waived.
3. Where upon the hearing of an application for mandamus it appears, from the answer of the respondent to the mandamus nisi, that issues of fact are involved in the cause, which are material to a proper determination of the same, it is erroneous to grant a mandamus absolute, without submitting such issues to a jury.

Submitted June 29, — Decided August 3, 1905.

Mandamus. Before Judge Seabrook. McIntosh superior court. May 22, 1905.

The Aiken Canning Company brought a petition for mandamus against "the Board of Commissioners for the County of McIntosh and City of Darien," alleging that the defendant was a corporation having charge and control of the county affairs of McIntosh county, Georgia. In the petition it was alleged that the petitioner, desiring to transplant oysters, in accordance with the provisions of the Political Code, § 1694, applied by petition to the defendant, in the terms of this code section, for its consent and approval of petitioner's proposed action; that the defendant, in violation of petitioner's rights, failed and refused, and still fails and refuses, to give its consent and approval as required by law. A copy of the plaintiff's application to the defendant was attached to the petition for mandamus. The prayer was for the writ of mandamus, directed to the defendant, commanding and

requiring it to give its consent and approval to the action desired by the plaintiff. The facts alleged in the petition were verified by the affidavit of the general manager of the canning company. A rule nisi was granted on April 20, 1905, requiring the defendant to show cause, etc., on the 4th Monday in May, 1905, and ordered served upon the defendant; and process was issued, requiring the defendant to answer the plaintiff's petition at the next term of the superior court of McIntosh county. On May 15, 1905, the defendant filed its answer, which, after stating the case, began as follows: "And now comes the Commissioners of McIntosh County, a corporation that has been served as the defendant in the above-entitled cause, and, answering, says:" etc. In this answer the "Commissioners of McIntosh County" admitted that the petition, a copy of which was attached to the plaintiff's petition for mandamus, was presented to "it," and that "it" failed and refused to give its consent as therein prayed for, but denied that such refusal was in violation of the plaintiff's rights. It alleged that there was no such territory within the county of McIntosh as is covered by section 1694 of the Political Code, and to which the defendant could grant the privileges that had been asked for by the plaintiff, and that all the oyster beds within the limits of the county and within one thousand feet of the shore line at mean low tide are either leased, owned by persons, or are such beds as are resorted to by the citizens of the State for procuring oysters for consumption or for sale; and that a mandamus would be nugatory and fruitless, and should, under the Civil Code, § 4870, be refused. The case came on to be tried at the May term of the superior court, when the defendant "moved to dismiss the proceedings in said case as to it, because the petition and rule nisi served upon it was a proceeding against the 'Board of Commissioners for the County of McIntosh and City of Darien,' and not against the 'Commissioners of McIntosh County.'" The court overruled this motion, and the defendant excepted. The plaintiff offered an amendment to its petition, changing the name of the defendant so that it should read "Commissioners of McIntosh County," which amendment was allowed by the court over the objection of the defendant, to which ruling the defendant also excepted. "Plaintiff then orally moved the court to make the mandamus absolute, claiming that the answer

of the defendant did not admit of the introduction of any evidence, and had not raised any question of fact that could be determined at that time; and after argument of counsel, the court sustained the motion of plaintiff and adjudged and decreed that the mandamus absolute issue as prayed," to which ruling and judgment the defendant excepted.

Charles M. Tyson, for plaintiff in error.

Kay, Bennet & Conyers, contra.

FISH, P. J. (After stating the facts.) 1, 2. The proper method by which to have raised the question made by the motion to dismiss was by plea in abatement, which has not been abolished in this State. But, irrespective of the method, the objection came too late. The defendant had appeared and filed its defense to the merits, admitting in its answer that it had been served as the defendant in the case. All the authorities recognize the dilatory nature of the objection upon the ground of misnomer of the defendant, and the necessity of making it as such. 14 Enc. Pl. & Pr. 296. The objection must be taken in limine, and the cases hold that where a party, whether a natural person or a corporation, is sued under a wrong name, and appears and pleads by the true name, without raising the objection of misnomer, the error is waived and the defendant will be concluded. *Rhodes v. Louisville*, 121 Ga. 553; *McCreery v. Everding*, 54 Cal. 168; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *City of Kingfisher v. Pratt*, 4 Okla. 284; *Hammond v. Starr*, 79 Cal. 556 (where the defendant was sued as "Ætna Iron Work, a corporation," when the true name, by which it appeared and pleaded, was "Ætna Iron Works Company"); *Board of Commissioners v. Huffman*, 134 Ind. 4 (where the complaint was against "The County of Huntington," when it should have been against "The Board of Commissioners of Huntington County"); *Chicago & Alton R. Co. v. Heinrich*, 57 Ill. App. 399, affirmed, 157 Ill. 388 (where the defendant, the "Chicago and Alton Railroad Company," was misnamed in the declaration as the "Chicago, Alton and St. Louis Railroad Company"). This rule is especially applicable in this State, where all misnomers in civil proceedings, "whether in the Christian names or surnames," may, on motion, "be amended and corrected instantly, without working unnecessary delay to the party making the

same." Civil Code, § 5102. This section applies to corporations as well as to natural persons. *Central Railroad v. Rogers*, 66 Ga. 252; *Johnson v. Central Railroad*, 74 Ga. 397; *Chattanooga R. Co. v. Jackson*, 86 Ga. 676. It follows that the court did not err in allowing the amendment which corrected the misnomer as to the defendant. As the plaintiff had the right to make this amendment at any stage of the cause, it also follows that even if the court had erred in overruling the defendant's motion to dismiss, such error would have been cured by this amendment.

3. In our opinion, the court erred in holding that the answer did not raise any question of fact to be determined by a jury, and in making the mandamus absolute upon the admissions of the defendant in its answer. The section of the Political Code under which the application to the board of commissioners was made by the canning company is as follows: "It shall not be lawful to take or catch any oysters in any of the waters of this State with or by a scoop, rake, drag, or dredge, or by the use of any other instrument than the oyster-tongs heretofore in general use for taking oysters, except within the waters more than one thousand feet distant from the shore-line at ordinary mean low tide. Oysters may be taken by any means or device from any private bed by the owner or lessee thereof, and for the purpose of transplanting to other beds in this State, from territory unleased within said limits of one thousand feet; but, in the last case, only upon the consent and approval of the county commissioners for the county within which said territory may be located, or upon the consent and approval of the ordinary of those counties which may have no board of county commissioners, which consent shall be given in all cases in which application is made for the purpose of transplanting oysters to other beds within the waters of this State, from such beds as are not resorted to by the citizens of this State for the purpose of procuring oysters for consumption or for sale." Pol. Code, § 1694. The position of the defendant in error is, that as its application was for permission to take oysters, for the purpose of transplanting to other beds within this State, from such public oyster beds as are not resorted to by the citizens of this State for the purpose of procuring oysters for consumption or for sale, the board of commissioners had no discretion whatever in the matter, but was bound to grant the application, upon its mere presenta-

tion, whether there were any such beds within the county of McIntosh or not; and the judge below evidently took the same view of the matter. We think this is too literal a construction of the statute. If the law means this, it is strange that the legislature should have required that any application should be made to the board of county commissioners, or ordinary, as the case may be, for permission to take oysters, within the limits defined, by any means or device, for the purpose of transplanting to other beds within this State, from such beds as are not resorted to by the citizens of this State for the purpose of procuring oysters for consumption or sale. Why require the application to be made to the board of commissioners, if under no circumstances the board can refuse to grant it? It seems to us that the purpose in requiring the application to be made in such a case as this must be to protect the oyster beds of a county from depredation by any and everybody who might undertake to gather oysters therefrom, by the use of any sort of means or device that they might see fit to employ, under the pretense of taking them, for the purpose of transplanting within the waters of this State, from unleased lands not resorted to by the citizens of the State for the purpose of procuring oysters for consumption or sale. We are of opinion that, under this section of the code, the proper county authority has, at least, the power of passing upon the bona fides of the application, and of refusing to grant it, if the circumstances are such as to warrant the conclusion that the application is not in fact made for the purpose therein expressed, or if there are no oyster beds within the waters of the county to which the consent asked for could apply. In the application of the canning company to the board of commissioners it was alleged that the applicant was "the owner and lessee of large territory of oyster beds and lands situate, lying, and being in the waters of McIntosh county." This allegation must have been made for the purpose of showing the good faith of the applicant and indicating in what waters within this State the oysters were to be transplanted. And we will say here that we think that in every application of this character the county authority applied to should be informed of the locality where it is proposed to transplant the oysters; otherwise there might be no way of ascertaining whether the oysters are to be transplanted to other beds within the waters of this State or not.

In its answer to the petition for mandamus the board of commissioners emphatically denied the allegation that the canning company is the owner and lessee of large territory of oyster beds and lands in the waters of McIntosh county, and alleged that from the fact that this "misstatement" was made in the application to the board, and from the further fact that there are no oyster beds in McIntosh county to which the consent asked for could apply, it believed that the application was "but a subterfuge on the part of the plaintiff so as to prey upon the oyster beds of McIntosh county, . . . which are not subject to the provisions of code section 1694." Under these circumstances, taking the allegation that there are no such oyster beds in McIntosh county to be true, we think the board had the power and was justified in refusing the application. The answer presented two questions of fact, to be determined by a jury, viz.: (1) Whether there were any oyster beds in McIntosh county to which the permission asked for could apply; and (2) whether the applicant was really the owner or lessee of any oyster beds or lands in that county upon which it proposed to transplant the oysters.

It is true that the section of the code in question declares that whenever the application is made for the purpose specified in the statute, and is limited to such unleased oyster beds as are not resorted to by the citizens of this State for the purpose of procuring oysters for consumption or sale, it shall be granted; but this does not necessarily mean that the applicant shall be the exclusive judge of the purpose for which the application is made. Suppose that the application is not in fact made for the purpose specified in the statute, but recites on its face that it is, is the board or the ordinary compelled to grant it? Suppose the real purpose, behind the application, is to take the oysters for the purpose of transplanting them within the waters of another State, or for the use of a canning factory owned or operated by the applicant, or for the purpose of selling them in their natural state, and the board of commissioners or the ordinary know or have good reason to believe this, must the permission be granted upon the mere presentation of the application? We can not believe that the legislature intended that whenever an application of this character is presented to the ordinary, or board of commissioners, it must be granted, even though it is not made in good faith, but is a mere

subterfuge or pretense under which to cover an illegal purpose. For these reasons, we think the court should have submitted the two question above indicated to the jury, and should not have granted a mandamus absolute unless both were answered by the jury in the affirmative. If the canning company was not the owner or lessee of any oyster beds or lands in McIntosh county, upon which it could transplant the oysters which it wished to take, then its application should not have been granted; for it did not indicate, in the application, a purpose to transplant the oysters upon any other oyster lands within this State. If there is no territory within the county of McIntosh to which the application could apply, the refusal to grant it was proper, as granting it would be a mere perfunctory and senseless act. At any rate, if this be true, the court ought not to grant a mandamus absolute; for this extraordinary writ is never issued for the mere purpose of settling, in favor of the applicant for it, a question in which he can have no real, substantial interest. "Mandamus will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless." Civil Code, § 4870.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

BAILEY v. DEVINE *et al.*

1. A note executed and made payable in another State by a citizen of Georgia is governed, as to its validity, force, and effect, by the *lex loci*; and, in the absence of proof as to the law of that State, the common law is presumed to be of force.
2. In order for duress of imprisonment, either actual or threatened, to have been available at common law as a defense to a contract, the imprisonment must have been unlawful.
3. An imprisonment may be originally lawful, and become unlawful. If one is in jail under a charge of murder, and another threaten to detain him in prison for an indefinite period and prevent a trial from taking place, this would amount to a threat of unlawful imprisonment.
4. A parent may avoid a contract given under duress of imprisonment of a child.
5. Where an attorney at law has been employed by a parent to defend his son, who is in prison charged with murder, and the fee for such service has been agreed upon, a promise to pay to such attorney for another attorney an additional sum due him by witnesses against the son, for securing their release from jail, is without consideration.

Argued June 29, — Decided August 3, 1905.

Complaint. Before Judge Hodges. City court of Macon. October 1, 1904.

Thomas H. Devine brought suit against Mrs. S. A. Bailey and W. H. Bailey, on a promissory note. The note was for \$500, was executed by the defendants in Pueblo, Colorado, and made payable to Devine & McAliney at the First National Bank of that place. The defendant Mrs. Bailey filed an answer, setting up the following facts: The note was obtained from her by Devine by threats, fraud, and duress. Defendant's son, W. H. Bailey, had killed a man in Pueblo, Colorado, and telegraphed for his mother, who resided in Macon, Georgia, to come to him. On arriving in Colorado, she found her son incarcerated in jail, charged with murder. He had spoken to the plaintiff Devine, an attorney at law, with a view to employing Devine to defend him. Mrs. Bailey found Devine in charge of her son's case, but Devine "declined to allow said case to proceed to trial until he should be paid a fee." Mrs. Bailey agreed with the attorney on a fee of one thousand dollars, telegraphed to Macon for that sum, and had it sent to her. After this had been done, Devine informed her that five men had been incarcerated in jail and held by the State of Colorado as witnesses against her son; that these five men had employed one McAliney to represent them, and had agreed to pay him \$500 for his services; that the State had released the five witnesses from jail; and they had declined to pay McAliney the \$500. The case of the defendant's son was set for trial on the day this conversation took place, and Devine demanded of the defendant that she pay McAliney the fee of \$500 before the case could proceed; plaintiff stating that unless this sum was paid, or a note therefor given, he would postpone the case and keep defendant's son in jail indefinitely. Defendant, being many miles from home, without friends, and absolutely in the power of Devine, and acting under and being coerced by the threat of Devine, gave the note sued on. She never agreed to pay but a thousand dollars as a fee for representing her son. Defendant had nothing to do with McAliney and had not employed him, and gave the note because she was made to believe that unless she did so her son would remain in jail for an indefinite period. Defendant also pleaded that the note was without consideration, as shown by the facts above detailed. The court struck the defendant's plea, and

entered up judgment against both of the defendants on the note. Mrs. Bailey excepted.

Davis & Miller and J. C. Morcock, for plaintiff in error.

Hardeman & Jones, contra.

COBB, J. 1. The note having been executed in Colorado, and being made payable there, its validity, force, and effect are dependent upon the law of that State; and no law of that State being pleaded, it will be presumed that the common law is in force with reference to the defenses set up in the defendant's answer. *Mass. Life Asso. v. Robinson*, 104 Ga. 286; *Hollis v. Loan Asso.*, 104 Ga. 318; *Kollock v. Webb*, 113 Ga. 768; *Akers v. Jefferson Bank*, 120 Ga. 1066.

2-4. At common law there were three kinds of duress,—duress of imprisonment; duress per minas, resulting from fear of loss of life, limb, mayhem, or of imprisonment; and duress of goods. 10 Am. & Eng. Enc. Law (2d ed.), 321-322; 9 Cyc. 444-445. Duress of imprisonment was available as a defense to a contract, if the imprisonment, or threatened imprisonment, was unlawful. See Clark on Contracts (2d ed.), 242 et seq.; Hammon on Cont. §§ 134-135, p. 190 et seq. An imprisonment which was originally lawful might, by a subsequent abuse of it, become unlawful and constitute duress. 1 Story on Cont. (5th ed.) § 512. An unlawful imprisonment, or threat of unlawful imprisonment, of one's child constituted duress. Clark on Cont. (2d ed.), 245; 10 Am & Eng. Enc. Law (2d ed.) 330; *Southern Express Co. v. Tyson*, 48 Ga. 358, 361. The provisions of our code with reference to duress are broader than the common law. The Civil Code, § 3536, provides: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Section 3670 declares: "The free assent of the parties being essential to a valid contract, duress, either of imprisonment, or by threats, or other arts, by which the free will of the party is restrained, and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." It is probable that the provisions of the sections quoted, so far as they relate to duress of imprisonment,

are no broader than the common law; and it may be that an imprisonment for an illegal purpose would be an unlawful imprisonment within the meaning of the common law. See, in this connection, *Southern Express Co. v. Tyson*, 48 Ga. 358, 361; *Hunt v. Hunt*, 94 Ga. 257; *Graham v. Marks*, 98 Ga. 67.

Bailey was lawfully in jail in Colorado under a charge of murder, but it was not lawful to keep him in jail indefinitely without a trial. His detention for any other purpose than a trial at the time and in the manner provided by law would be unlawful. The threat of Devine was to bring about an abuse of the lawful imprisonment of Bailey, in order to cause his mother to give the note sued on. Such an act would, even under the strict common-law rule, constitute duress. We can well understand how a woman, ignorant of the law, a thousand miles away from home, relying upon the supposed knowledge of the law and integrity of the plaintiff as an attorney at law, might have thought that he was able to carry his threat into execution, and might therefore have been coerced into a promise to pay the sum sued for, to release her son from the threatened detention in jail without trial. Comment upon the grossly reprehensible conduct of the plaintiff, as shown by the answer, is unnecessary, and would perhaps not be proper, as he has not been heard; but we are clear that the plea of duress was good, and that the court erred in striking it.

5. We are also unable to discover, from the facts pleaded, any valid consideration for the note. The fee of the attorney had been agreed on, and had either been paid to him or was about to be paid. The consideration, therefore, for the note could not have been the performance of services in defense of the defendant's son. Where, then, was the consideration? The witnesses for the State had been released from jail. The plaintiff and McAliney did not undertake to get the witnesses out of the way; and if they had, the contract would have been void as against public policy. *Rhodes v. Neal*, 64 Ga. 704. There was no benefit accruing to the defendant by the payment of the fee due by these witnesses to McAliney. She was wholly a stranger to the contract with him for fees. It can not be said that the promise to bring on the son's trial was the consideration, because the plaintiff had already been paid to represent the son, and certainly his employment comprehended the use

of such efforts and agencies as he could properly use to bring about the son's speedy trial and release from custody. Besides, a promise to release from an unlawful imprisonment which the promisor himself made unlawful would not afford any valid consideration for a contract to pay for such a service. In any view of the facts set up in the defendant's answer, the plea of no consideration should not have been stricken.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

ROSS, guardian, v. JACKSON.

A landlord is liable to one lawfully present on the rented premises, by invitation of the tenant, for injuries arising from defective construction, or from failure to keep the premises in repair, where the defect is known to the landlord or in the exercise of reasonable diligence could have been known, and the injured person was himself in the exercise of due care.

Argued June 29, — Decided August 3, 1905.

Action for damages. Before Judge Hodges. City court of Macon. October 1, 1904.

A suit for damages was instituted by Mary O. Jackson against Laura B. Johnson, the plaintiff having received personal injuries while attempting to cross a porch connecting two of the rooms of a house belonging to the defendant and rented by her to a tenant. The plaintiff alleged, that she was lawfully upon the premises at the invitation of the tenant, and was at the time in the exercise of due care; that the flooring of the porch suddenly gave way, causing her to fall to the ground beneath, and she sustained permanent injuries. She complained that the defendant was negligent "by reason of the fact that said house, and the flooring, particularly where petitioner fell through, was defectively constructed and defectively maintained, and she was negligent in not repairing the same so as to make it safe and sound. Her negligence consisted further in the fact that she made no inspection of this floor and its underpinning and its condition, as it was her duty to do, and allowed the same to become weak and rotten and to fall through as stated; and she was negligent in allowing said floor to be built there in a most unworkmanlike manner and in a weak and defective manner, and in allowing the same to be

built and remain there without being supported by proper joists and props and underpinning." Subsequently to the filing of the petition, John P. Ross, who had been appointed guardian of Laura B. Johnson, was made a party defendant to the action. As such guardian he demurred to the petition, on the grounds, (1) that no cause of action was set forth; (2) that the allegations made respecting the defective construction of the house and the failure of the landlord to keep it in repair were not sufficiently full and explicit; and (3) that the plaintiff did not allege that the landlord had any notice or knowledge of the defects alleged to have existed in the floor of the house. The demurrer was overruled, and the defendant excepted.

John P. Ross, for plaintiff in error.

Marion W. Harris, contra.

EVANS, J. (After stating the facts.) A landlord is not an insurer, but he is under a legal duty to keep the rented premises in repair, and is liable in damages to a person who receives injury while lawfully upon the premises and who is in the exercise of due care, if the injury arises because of the defective construction of a building erected on the premises by the landlord, or because of his failure to repair defects of which he knows or in the exercise of reasonable diligence ought to know. Civil Code, § 3118; *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901; *Stack v. Harris*, 111 Ga. 149. A tenant is entitled to exclusive occupancy during the term of the tenancy, and it is his duty, if the premises get out of repair, to notify the landlord of their defective condition. The landlord is under no duty to inspect the premises while the tenant is in possession, in order to keep informed as to their condition. The petition filed in the present case alleged that the landlord was negligent in allowing the floor of the porch to be built in a most unworkmanlike manner, and in a weak and defective manner, and in allowing the same to be built and remain without being supported by proper joists, props, and underpinning. In effect, this is a statement that the floor was defectively constructed by the landlord. No fair inference can be drawn that it was built by a predecessor in title of the landlord. The allegation is that she was negligent in allowing the floor to be built in such an unworkmanlike manner and in allowing it to remain in its unsafe condition. If at the time of its original construction she had no

interest in the premises, she would not, of course, be responsible for the unworkmanlike way in which the porch was built. The liability of a landlord for defective construction exists only in cases where the structure is built by him in person or under his supervision or direction. If a building were defectively constructed by a predecessor in title, and the landlord knew or by the exercise of reasonable diligence could have known of its improper construction before the tenancy was created, he would be answerable to the tenant, or to any one lawfully on the premises by invitation of the tenant, for injuries sustained by reason of his failure to put the premises in a safe condition, if the person sustaining the injuries could not have avoided the same by the exercise of ordinary care. Construing the petition, then, as alleging that the porch was built in an unworkmanlike, weak, and defective manner by the landlord, and that the plaintiff was injured because of the landlord's negligence in this respect, a cause of action was set forth, and there was no merit in any of the grounds of the demurrer.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

ADAMS v. HAIGLER et al.

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1. The petition was not subject to any of the objections set forth in the demurrers. The amendment offered thereto was germane, and did not set out a new cause of action.
2. H. & F. entered into a joint contract in writing with A., to build a house according to certain plans and specifications, and to complete the work by a named date. H. & F. also gave bond with B. as surety, the condition of which was that the principals should well and truly comply with all the terms of the contract, or that the surety would do so for them. F. alone began the work, but abandoned it before its completion. H. then, with the consent of A., and with the knowledge and at the instance of B., undertook to complete the building, but failed to comply with a provision of the contract requiring the contractors to find all material, labor, etc. *Held*, that a stipulation in the contract authorizing A., in case of the default of H. & F., to employ a third person to complete the work never became operative; that the act of H. in carrying on the work was, under the allegations of the petition, not a novation but in pursuance of the original contract; that B's risk as surety was not increased by any act of A.; and that the condition of the bond was broken by H's failure to comply with the terms of the contract.
3. A stipulation in a building contract, that if any damage shall arise by reason

of delay in completing the work, and the parties are unable to agree, "the same shall be referred to arbitrators," will not prevent a suit in the first instance for damages so occasioned, unless it is clearly and unequivocally provided in the contract that arbitration shall be either a condition precedent to suit, or be the only mode for the assessment of damages.

4. A defense to a suit on a building contract, that delay was due to alterations and additions, and that the contract provided the contractors should not be liable for delay so occasioned, should be made the subject of a plea; and in the absence of an allegation in the petition that delay did result from such a cause, the petition is not subject to demurrer.

Argued June 29, — Decided August 3, 1905.

Action on bond. Before Judge Hodges. City court of Macon. December 10, 1905.

Adams brought suit upon a bond against Haigler and Frey as principals, and Bazemore as surety. The petition alleged: The plaintiff entered into a contract with Haigler and Frey on January 9, 1904, under which they were to build a house of a certain description and do other work stipulated in the contract. The plaintiff fully complied with all of his obligations, and has paid out upon the order of Haigler, for material and labor in the construction of the house and necessary for its completion, the sum of \$3,514.73, of which a bill of particulars is attached to the petition; but of this amount the defendants are entitled to credits which will reduce it to \$3,426.03. Frey utterly failed to comply with the contract, and it was absolutely necessary for the plaintiff to advance the sum above referred to, to enable Haigler to perform the work, and the material was purchased and the labor employed under the direction of Haigler. Haigler and Frey utterly failed to find all materials, labor and services, tools, scaffolding, implements, and power of every kind necessary for the full completion of the building, as set forth in the specifications therefor, and as required by the third paragraph of the contract; and the plaintiff was thereby injured and damaged in the sum of \$426.03, besides interest, that amount having been expended, in excess of the contract price, in the purchase of materials, etc., necessary to complete the work at the least expense. Haigler and Frey likewise utterly failed to comply with that portion of the contract which required them to complete the house on or before April 15, 1904, and have never yet completed the same; the house never having been sufficiently completed for the plain-

tiff to occupy the same until May 15, whereby the plaintiff was injured and damaged in the sum of \$40, the value of one month's rent. The house is not yet completed in accordance with the contract, the work necessary to be done to complete it being set out in detail in the petition. Haigler and Frey have therefore failed to well and truly comply with all the terms and conditions set forth in the contract, and have likewise failed to fully carry out and comply with their obligations in the particulars above set out; and Bazemore has likewise failed to do so for them. The bond has therefore been broken, to the injury and damage of the plaintiff. Attached to the petition were copies of the bond and the contract. The bond was in the sum of \$500, payable to the plaintiff, and the condition was that Haigler and Frey should well and truly comply with all the terms and conditions in the contract (a copy of which was attached to the bond), and fully carry out and perform all their obligations therein, or that Bazemore should do so for them. The contract provided that the house should be erected according to the plans and specifications of a named architect, which were made a part of the contract, and that it should be completed on or before April 15, 1904; but that if any additions and alterations were made, further time should be allowed, if such additions and alterations should be the cause of the delay and the contractors had exercised reasonable diligence in reference to the same. Those portions of the contract which are material in the present controversy are as follows:

"3. The contractor shall find all materials, labor and services, tools and scaffolding, implements, and power of every kind necessary for the full completion of said building, as set forth in these specifications.

"4. The owner shall pay to the contractor, for the full, safe, and perfect completion of the work, the sum of \$3,000.00; but if the owner, with the consent of the architect, shall direct in writing any additions to, or alterations of, or omissions from the plan or works, the value of such shall be added to or deducted from the said sum of \$3,000.00, as the case may be, such value to be computed by the architect, whose decision shall be final and conclusive on both parties hereto.

"7. If the contractor shall become bankrupt or insolvent, or make an assignment for the benefit of his creditors, or shall sus-

pend or delay the performance of any part of this contract for five days after a notice shall be served upon him or left at his place of abode by the architect, requiring him to proceed with and perform the same, it shall be right for the owner, with the consent of the architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete said works, and to use the materials of the contractor there being, and the cost and expense incurred in carrying on and completing the said works shall be deducted by the owner from any money due or to become due the contractor; and if said work is not completed for the sum at which the contractor agreed to do it, then the said contractor shall make said overplus good to said owner; such overplus shall be a valid debt against the contractor. The expense incurred by the owner as herein provided, either for furnishing materials or furnishing the work, or both, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties hereto.

"8. In case the works and things hereby contracted to be done by the contractors shall not be done and completed the time hereinbefore mentioned, the contractor shall pay to the owner, on demand, such damages as can be shown by reason of such delay, for every day that may elapse from the appointed and actual time of completion, as mentioned in clause 1st, allowance being made for delay (if any) occasioned in the execution and completion of the work by reason of additions to, alterations of, or omissions, as provided for in clause 1st, or for strikes, fire, or similar accidents; and if parties are unable to agree as to the amount which may be claimed, the same shall be referred to arbitrators, one selected by the contractor, and one by the owner, and these two shall have power to name an umpire, whose decisions shall be binding on all parties."

Each of the defendants filed a general demurrer, as well as a special demurrer upon specified grounds. Before the demurer was heard the plaintiff offered an amendment, which is in substance as follows: Bazemore had full notice and knowledge of the failure of Frey to comply with the contract, of the failure of Haigler and Frey to find materials, labor, etc., and of the payments made by the plaintiff as set out in the petition. He also had full

notice and knowledge at the time of the fact that the plaintiff was completing the building contracted for. "Said W. L. Bazemore himself procured the said Haigler to perform the work as set out in the petition," and Bazemore, with full notice and knowledge, utterly failed himself to carry out the obligations of the contract. The plaintiff acted in good faith, for the purpose of reducing the damages arising by reason of the breach of the contract as much as possible, and the work was done and material purchased at the lowest possible sum necessary to construct the building according to the specifications. The court refused to allow the amendment, sustained the demurrers, and dismissed the petition. To these rulings the plaintiff excepted.

Hardeman & Jones and *E. P. Johnston*, for plaintiff.

M. Felton Hatcher, for defendants.

COBB, J. 1. The amendment should have been allowed. It was germane to the petition, and did not set forth a new cause of action. See *City of Columbus v. Anglin*, 120 Ga. 785. One of the distinct terms in the contract was that Haigler and Frey were to find all material, labor, etc., necessary for the full completion of the building as set forth in the specifications. The condition of the bond was that they should well and truly comply with all the terms and conditions of the contract. The petition alleged that they utterly failed to find material, labor, etc., which was necessary to complete the building, and that as a consequence the plaintiff was damaged in a stated amount, being the sum which he was required to pay out in excess of the contract price; and the amendment which was rejected alleges that this sum was necessarily expended for this purpose, and that the labor and materials were secured at the lowest possible cost, a bill of particulars to the petition setting forth each item that was thus procured. These allegations in the original petition and the amendment seem to set forth a complete cause of action upon the bond, and if there were no other allegations in the petition, the plaintiff would be entitled to recover upon proof of the averments.

2. But it is said that under the 7th paragraph of the contract the plaintiff had no right to take charge of the work except in the manner therein specified, that is, that it was necessary to give the contractors five days notice to continue the work, and, upon their failure, to obtain the consent of the architect to take charge of the

work. It is claimed that this provision in the contract was not complied with, that the risk of the surety was thereby increased, and that he is discharged from any liability on the bond. The contract of Haigler and Frey was to complete the work. The contract of Bazemore was to complete the work for them if they failed to do so; and in the event both failed, the contract of the principals and surety on the bond was to indemnify the plaintiff against loss on account of such failure. The purpose of the 7th paragraph of the contract was the protection of the plaintiff against the failure of both Haigler and Frey, the plaintiff thereby being given the right under certain conditions to have the work completed by other persons. It would seem from the allegations of the petition that while the contract was a joint one of Haigler and Frey, the work was first begun and carried on by Frey alone; and if he had completed the work, this would have been a compliance with the contract, for performance by either of the joint obligors would have been a sufficient compliance with the contract. When Frey abandoned the contract, it seems that Haigler was willing to undertake to comply with the same, that his willingness to complete the contract was not only known to Bazemore, but that it was at Bazemore's instance and request that Haigler took up the unfinished work of his co-obligor, which he had a right to do. It was during the time that Haigler was undertaking to comply with the contract that he failed, certainly at one point, and possibly at others; that is, he failed to find the material necessary. The plaintiff did not take the work completely out of the hands of both Haigler and Frey, as he would probably have had a right to do, after service of the notice and the consent of the architect, but Haigler was allowed, with the knowledge of Bazemore, the surety, to continue the work which Frey had failed to complete. Both Haigler and Frey were under an obligation to complete the work, and it was immaterial to the plaintiff which one actually did the work. Bazemore, the surety, was surety for both, and he was alike responsible for the failure of either. Haigler's taking the place of Frey in the actual conduct of the work, at the instance of the plaintiff, with the knowledge of Bazemore, was in no sense a novation of the contract. Haigler was simply doing what he was under an obligation to do; and we do not see how the risk of Bazemore was in any sense increased by the work

being shifted from one of the contractors to the other one, when he was bound under the bond for the faithful performance of the contract by each and by both. The condition of affairs contemplated by the 7th paragraph of the petition does not seem to have arisen, that is, where the plaintiff would be compelled to secure the services of some one not connected with the original contract to complete the work. If the allegations of the petition were that both Frey and Haigler had entirely abandoned the contract and failed to perform its conditions, and that the plaintiff had made a new and independent agreement with Haigler to complete the work, without reference to the old contract, an entirely different question would have been raised; and it is probable that the right of the plaintiff to recover would have been dependent upon his compliance, either literally or in substance, with the stipulations of paragraph 7. But, as we interpret the petition, this was not the case. Frey attempted to perform, and failed. Haigler took his place, and he likewise failed at the point where the contract required him to find the material. But each was attempting to carry out the original contract, and Bazemore was bound as surety for them on the original contract, and was liable for the failure of each to perform the contract, as he would have been liable if both of them had together failed to perform.

3. The contract provided that the house should be completed on a given day. It was distinctly alleged that the house was not completed on this day, and there were allegations showing the damage which resulted from this failure. The failure to complete the contract on the day named was a breach of the bond. But it is said that the plaintiff is not entitled to recover this damage, for the reason that paragraph 8 of the contract requires the damage to be determined by arbitration, and there could be no recovery of such damage until there had been an arbitration in the manner provided. It is unquestionably true that parties may stipulate in a contract that the amount of damage in case of a breach shall be fixed by arbitration. But such a stipulation would not bar a party damaged by the breach from recovering the damages by suit, even though there were no arbitration, unless the provision for arbitration amounted to a condition precedent to the right to resort to the courts, or arbitration was made the only mode by which the amount of damages should be ascertained. *Liverpool*

Ins. Co. v. Creighton, 51 Ga. 110. See also *Cole v. Mfg. Co.*, 91 Tenn. 525. The language of paragraph 8 of the contract is, that, if the parties are unable to agree as to the amount due for delay, etc., "the same *shall* be referred to arbitrators." The question is whether the mere use of the word "*shall*" makes the submission to arbitration a condition precedent to suit. We do not think so. In the case of *Hamilton v. Insurance Co.*, 137 U. S. 370, a stipulation in an insurance policy, where the word "*shall*" was used in the same connection as it was in this contract, was held not to make the stipulation one which would require arbitration as a condition precedent to an action at law. See also, in this connection, *Cole v. Mfg. Co.*, *supra*; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622 (1). Parties have a right to appeal to the courts for the assessment of damages to which they may be entitled, growing out of a breach of a contract into which they have entered; and while the law authorizes them to make a binding agreement that the damages shall be assessed in other ways and by other tribunals, either provided by law, or created by themselves for this purpose, before any one will be deprived of an appeal to the courts it must appear from clear and unequivocal language in the contract that such was the intention of the parties. There may be cases where a party would be liable to an action for damages for a failure to submit the controversy to arbitration upon an agreement to do so, when such agreement could not be pleaded in bar of the action. *Hamilton v. Ins. Co.*, 137 U. S. 385.

4. It is also said that the petition should have alleged that the delay was not due to alterations and additions being made as provided by the contract; but we think this is matter of defense and should be made the subject of a plea. The petition was sufficient to call for an answer from both of the principals and from the surety.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

LAMAR, TAYLOR & RILEY DRUG COMPANY v. LAMAR
et al., executors.

123 667
1128 724

1. An assignment of error to the effect that the court erred in sustaining a motion to "rule out all of the evidence tending to show" a given state of facts, without specifying, either literally or in substance, the evidence which was ruled out, presents no question upon which this court can pass.
2. The bill of exceptions failing to clearly show upon what evidence the judgment directing a verdict was predicated, it can not be determined whether that judgment was or was not erroneous; and as it is incumbent upon the complaining party to affirmatively show error, an affirmance of the judgment must result.

Argued June 30, — Decided August 3, 1905.

Complaint. Before Judge Hodges. City court of Macon.
January 7, 1905.

Lane & Park, for plaintiff in error.

Dessau, Harris & Harris and *Hall & Wimberly*, contra.

CANDLER, J. This was an action by H. J. Lamar and W. D. Lamar, as executors of H. J. Lamar deceased, against the Lamar, Taylor & Riley Drug Company, to recover \$4,638.83 principal, besides interest, alleged to be the balance due on a promissory note for \$25,000, made by the defendant and payable to the plaintiffs. The note, a copy of which was set out in the petition, recited that it was "given as part purchase-money as per terms of contract and agreement dated December 27th, 1901, by and between the Taylor & Peek Drug Company and H. J. Lamar and W. D. Lamar, executors of the estate of H. J. Lamar." The defendant admitted the execution of the note sued on, but pleaded, as stated in the bill of exceptions, accord and satisfaction, failure of consideration, recoupment, set-off, and fraud. At the trial, after hearing evidence, the court directed a verdict for the plaintiff for \$3,335.26 principal, \$507.88 interest and costs; and the defendant brought the case by direct bill of exceptions to this court for review. The bill of exceptions sets out at length the evidence introduced on the trial, and recites that after the introduction of this evidence, the plaintiffs "moved to rule out all of the evidence showing or tending to show any representations made by the parties, or either of them, prior to the execution of the contract, upon the ground that such testimony tended to vary the terms of the written contract of

sale between the executors and the defendant company, and upon the ground that all such were merged in the written contract." It is also recited that "after argument had, the court sustained the motion to rule out all of the evidence tending to show any representations made on the part of the plaintiff or plaintiffs, either or both of them, prior to the making and execution of the contract;" and this ruling is assigned as error.

The defect in such an assignment of error should be readily apparent. No particular evidence is pointed out as having been excluded by the trial judge; but the court is asked to search exhaustively through the entire evidence, culling therefrom that which, in its opinion, shows or tends to show a given state of facts, consider that evidence as ruled out, and decide whether its rejection was error. It is hardly necessary to say that this is a task which the law does not impose upon us, and which we can not undertake to perform. No principle of law is more firmly established than that an assignment of error upon the admission or rejection of evidence must set the evidence out, either literally or in substance; and this is true whether the assignment be made in a motion for a new trial or in a bill of exceptions. 9 Enc. Dig. Ga. Rep. 702. And in the present case it can not be said that the assignment of error sets out the evidence even in substance, for it refers to a voluminous mass of testimony from which, as already stated, the court must, in order to pass upon the question presented, pick out that which in its opinion shows or tends to show a given state of facts. Counsel making the motion to rule out should have been required to specify the exact evidence desired ruled out; and the bill of exceptions should and would in that event have with certainty indicated that which was excluded. We are clear, therefore, that the assignment of error upon the rejection of evidence presents nothing upon which this court can intelligently pass; and this, in turn, leaves us in a similar predicament as to the remaining assignment of error, viz., that the court erred in directing a verdict in favor of the plaintiffs. For we have before us a mass of evidence, some of which we are assured was ruled out by the trial judge. Whether that which is left will authorize the direction of a verdict we are unable to say; because we are not in a position to separate the wheat from the chaff—to say which of the evidence it was that

was left in, and upon which the direction of a verdict was based. It is incumbent upon the complaining party to show error, and to specify it plainly and distinctly. In the present case this was not done, and an affirmance of the judgment must result.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

MINERAL BLUFF BOARD OF EDUCATION *v.* MAYOR AND COUNCIL
OF MINERAL BLUFF.

EVANS, J. 1. This court has no jurisdiction to pass upon an assignment of error complaining of the overruling of a demurrer to the answer of the mayor and councilmen of a municipal corporation to an application for the writ of mandamus, when the trial court holds that the answer presents an issue of fact and refers the issue of fact to a jury, and when there has been no final judgment thereon.

2. But it has jurisdiction to pass upon an assignment of error complaining of a refusal to sustain a motion to make the mandamus absolute; because, if this motion had been granted, it would have finally disposed of the case.

3. The motion to make the mandamus absolute was properly refused, because the answer of the respondents had not been stricken. The sufficiency of an answer can not properly be brought in question by a motion to enter a judgment in favor of the plaintiff, based on the ground that the answer sets forth no defense, after a demurrer to the answer has been overruled. *Hollis v. Nelms*, 115 Ga. 5; *Stromberg v. Bisbee*, Ib. 846.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 1, — Decided August 3, 1905.

Petition for mandamus. Before Judge Gober. Fannin superior court. May 24, 1905.

J. Z. Foster, William Butt, and Jeff Hedden, for plaintiff.

MEYER & COMPANY *v.* JORDAN, mayor, *et al.*

Mandamus will not be granted to compel municipal authorities to levy and collect a tax to pay a judgment alleged to be held by the applicants against the municipality, where it appears that the judgment relied on is not a valid judgment against it.

Submitted June 20, — Decided August 3, 1905.

Petition for mandamus. Before Judge Reagan. Pike superior court. February 4, 1905.

E. J. Meyer & Company applied for a writ of mandamus against the mayor and council of the Town of Molena, to compel them to levy and collect a tax sufficient to pay a judgment which the plaintiffs alleged they had obtained against the town. The mandamus was denied, and they excepted. On the hearing of the application the record of the suit and judgment on which the plaintiffs relied was introduced in evidence. The petition alleged that Molena was a municipal corporation chartered under the general laws of the State in regard to chartering towns, contained in the Political Code, §§ 774-797; that G. W. Bolton was the mayor, W. T. Cockrell the recorder, and A. B. Harris, J. A. Carmichael Jr., J. A. Melton, G. M. McDowell, and J. H. Lawrence were the councilmen; that the town was due the plaintiffs the sum of \$598.50, besides interest, for whiskies, gin, etc., purchased from the plaintiffs by the mayor and council; that the mayor, recorder, and councilmen of the town purchased all of the articles for the town; and that at the time of the purchase the town was engaged in conducting a dispensary and in buying and selling whisky, gin, and wine for profit. The petition closed as follows: "That the said mayor, recorder, and council of Molena refuses to pay petitioners; wherefore process is prayed against the Town of Molena, requiring the defendant to be and appear," etc. The process which was issued stated the case as that of "E. J. Meyer & Co. vs. G. W. Bolton, mayor, et al., of the Town of Molena," and stated that "the defendants, G. W. Bolton, A. B. Harris, J. A. Carmichael Jr., J. A. Melton, G. M. McDowell, J. H. Lawrence, and W. T. Cockrell, recorder, are required, personally or by attorney, to be and appear," etc. On the petition was endorsed an acknowledgment of service, which was signed by "G. W. Bolton, mayor of Molena, W. T. Cockrell, recorder of Molena," and the other persons named in the process as "council of Molena." The verdict was for the plaintiffs for the amount sued for. The judgment entered was that the plaintiffs recover of "the defendant, G. W. Bolton, mayor of Molena, W. T. Cockrell, recorder," and the other persons named as "councilmen of the Town of Molena." In the record appears a paper which is headed with the word "amendment." It states the case thus: "E. J. Meyer & Co. vs. The Town of Molena. Suit in Pike superior court, Oct. term, 1904." It

alleges that "at the time the defendants entered their acknowledgment of service in the above-stated case, it was by them intended to waive everything that was necessary to give the court jurisdiction, and by inadvertence on the part of . . . the attorney of record who wrote the acknowledgment of service in said case he wrote the words 'copy process,' instead of the word 'process.'" The petitioners therefore moved the court to allow them to amend the entry of acknowledgment of service accordingly. At the bottom of this paper is written the following entry: "The foregoing amendment is allowed, this February 2nd, 1905," signed by the judge of the superior court. There is also in the record another paper above which is written the word "amendment." This states the case in which it is made as "E. J. Meyer & Co. vs. The Town of Molena. Application for mandamus, in Pike superior court, Oct. term, 1904." It contains the following: "The plaintiffs in the above-stated case show unto the court the following facts: . . . Counsel who represented petitioners in said inadvertence omitted to set out in the judgment therein obtained in their favor against the defendant, the Town of Molena, that said town was a municipal corporation, chartered under the laws of Georgia, in the name of the Town of Molena, although this fact was averred in the petition upon which said judgment was obtained. . . . Petitioners move the court to grant an order allowing the movants to amend said judgment by adding therein, and next following the word 'Molena' last mentioned in said judgment, the words, 'a municipal corporation chartered under the laws of Georgia, in the name of the Town of Molena,' so as to make said judgment conform in all respects to the petition and verdict upon which said judgment was entered up; petitioner moves the court to allow the execution issued upon said judgment to be amended by adding the same words, so the said judgment and execution when so amended will in all respects conform to the petition and verdict upon which they issued." At the bottom of this paper are written the words: "Read and considered; the amendment allowed, this February the 2nd, 1905," signed by the presiding judge.

G. D. Dominick and E. C. Armistead, for plaintiffs.

E. F. Dupree and R. L. Berner, for defendants.

LUMPKIN, J. (After stating the foregoing facts.) In the bill of exceptions the two amendments dated February 2, 1905, are referred to as if they were independent motions to amend the acknowledgment of service and the judgment. In the record, however, they appear to have been tendered as amendments to the petition for mandamus. In one instance, after stating the name of the case, the proposed amendment is headed: "Suit in Pike superior court, Oct. term, 1904." In the other it is stated as "application for mandamus, in Pike superior court, Oct. term, 1904." Neither of these descriptions is applicable to the suit in which the judgment was obtained, which was instituted in September, 1901. The mere entry of the words "amendment allowed" at the foot of each of these papers, properly construed, means that they were respectively allowed as amendments to the application for mandamus. Such an entry does not operate to alter the judgment and change it into a shape entirely different from that in which it was rendered. But if these entries should be construed as orders seeking to amend the acknowledgment of service and the judgment respectively, they would still not have the effect of making a valid judgment against the municipal corporation. No process was ever issued against the Town of Molena, but only against certain individuals described respectively as "mayor," "recorder," and "councilmen" of that place. The acknowledgment of service was similarly signed. The only change sought to be made was by striking the word "copy" before the word "process," so as to make a waiver of process. It still remained an acknowledgment of service and waiver of process by the individuals, and not by the municipality. No plea by the town appears to have been filed. The Town of Molena, therefore, has never been brought into court, either by process directed to it, or by service or acknowledgment of service on its behalf. This being true, there was no lawful verdict against it, and no judgment could be entered against it, nor could any amendment of the judgment which was actually rendered have that effect. The plaintiffs' application for mandamus, therefore, had no valid judgment as a basis on which to rest; and, without regard to the other questions raised, the refusal to make the mandamus absolute was right.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

CREDILLE, executor, *et al.* v. CREDILLE *et al.*

123	673
f127	700

1. Upon the trial, before a jury, of an issue of devisavit vel non, when in the paper propounded as the will the alleged testator has not left his property to strangers, but to one of his sons and such son's wife and children, the principle laid down in the latter clause of section 3258 of the Civil Code is not applicable, and it is erroneous to give it in charge.
2. Upon the trial of such an issue, the burden, in the first instance, is upon the propounder of the alleged will to make out a *prima facie* case, by showing the factum of the will and that at the time of its execution the testator apparently had sufficient mental capacity to make it and, in making it, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveators.
3. Declarations of the testator, made within a few months after the date when the alleged will purports to have been executed, to the effect that he had not made a will, and that if he had signed a paper purporting to be one, he did not know what he was doing, are admissible in evidence, not as evidence of the truth of the facts so stated, nor as evidence that any fraud was practiced upon him or any undue influence exerted over him in the matter, nor as evidence that he had revoked the will, but simply for the purpose of showing the state of his mind when the paper purporting to be his will was executed, and whether or not he then had sufficient mental capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another.

Submitted May 18, — Decided August 8, 1905.

Petition to set aside probate. Before Judge Lewis. Greene superior court. August 20, 1904.

Samuel H. Sibley and *James B. & Noel P. Park*, for plaintiffs in error. *James Davison*, contra.

FISH, P. J. Reuben A. Credille died September 8, 1902, aged seventy-six years, leaving as his next of kin four sons and two daughters, all of age. On the tenth of October thereafter a paper purporting to be his last will and testament was probated, in common form, by his son, W. Florence Credille, the date of its execution being February 27, 1902. In it the testator gave the bulk of his property, consisting of his old homestead of 650 acres of land, to this son, his wife, and children. He gave nothing to his other children, except to one other son, to whom he bequeathed a feather bed and pillows. W. Florence Credille was named as sole executor in this instrument. Some months after the probate the other three sons and one of the daughters of the testator brought a petition in the court of ordinary, to set aside and cancel this will, against W. Florence Credille, as executor and as an in-

dividual, and his wife, Mrs. Annie Credille, and their seven minor children, naming them. In the petition it was charged that at the time the alleged will purported to have been executed Reuben A. Credille was paralyzed and was totally lacking in capacity, both mentally and physically, to make and execute a will; that at the date of the paper purporting to be his will he was sick and in bed at the home of W. Florence Credille and entirely under his influence; that if he signed such paper at all, he was moved thereto by undue influence exerted over him by said W. Florence Credille; that if he signed said will, it was not his will, because fraud was practiced upon him by which he was made to believe that he was signing an entirely different instrument, and that the instrument probated was a paper of which the deceased knew nothing; and that this imposition was practiced upon him by W. Florence Credille. W. Florence Credille was appointed guardian ad litem for his children; and the defendants answered, denying the charges of the petition, and alleging that at the date of the will the testator was of sound mind and disposing memory and fully capacitated to make a will, and did make the will in question, uninfluenced by any of the defendants or by any other person, and of his own free will and mind. The case thus made was appealed by consent from the court of ordinary to the superior court, where it was tried, the trial resulting in a verdict and judgment in favor of the caveators and setting aside the will. The defendants moved for a new trial, which was refused, and they excepted.

1. Upon the trial the court gave section 3258 of the Civil Code in charge to the jury. That section reads as follows: "A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the State; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused." One ground of the motion for a new trial alleges that the court erred in giving this instruction, the assignment of error being that the facts of the case did not authorize it and that it tended to prejudice the case of the propounders in the minds of the jury. We think a new trial should

have been granted upon this ground of the motion. The testator did not leave his property to strangers, but to his son, Florence, and his wife and children; and the strict rule, that upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate of the will should be refused, which is applicable to cases in which a testator leaves his property to strangers, to the exclusion of his wife and children, should not have been given in charge. The contention that if there were error, it was harmless, as the evidence showed that the testator did not leave his property to strangers, and therefore the jury would understand that this rule or principle was not applicable to the case before them, is in conflict with the decision of this court in *Wetter v. Habersham*, 60 Ga. 193. There a testatrix, who left no children or descendants of children, bequeathed the bulk of her property to strangers, and so bequeathed all of it, "if the word 'strangers' be taken to mean any persons not bearing the relationship of husband and wife or children." It was held, that as the heirs at law of the testatrix, who were contesting the will, were her remote or collateral kindred, it was erroneous to give in charge to the jury the latter clause of this section of the code. If it is erroneous to give it in charge in a case in which both the legatees and the kindred excluded by the will stand, relatively to the testatrix, upon the footing of strangers, then it must follow that it is equally erroneous to give it in charge in a case where both the legatees and the kindred excluded stand upon the footing of children. The evidence upon which the will in the present case was set aside by no means demanded such a verdict, and the giving of this erroneous instruction requires the grant of a new trial.

2. Another ground of the motion was, that the court erred in charging as follows: "The burden of proof in the case rests upon the propounders of the will in the first instance. In the opening of the case the burden of proof is upon Florence Credille to propound the will, and he is here to-day asking that the will be sustained as a valid will. The burden rests upon him to show that the paper was executed, and to show the capacity of the testator." There was no error in this charge. It was in accordance with the decisions of this court in *Evans v. Arnold*, 52 Ga. 169, and *Wetter v. Habersham*, supra. All that the propounders

of a will have to do, in a case like this, is to make out a prima facie case, that is, to show the factum of the will and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily; but they must do this much before the onus is shifted to the caveators. In *Thompson v. Davitte*, 59 Ga. 472, 475, Bleckley, J., said: "The truth is, that what the propounders have to carry, on the score of sanity and freedom, is more in the nature of ballast than of cargo. It is just burden enough to sail with — no more." In *Freeman v. Hamilton*, 74 Ga. 317, where the paper propounded as a will was attacked upon grounds similar to those involved in the present case, it was held that while a charge, that "when a paper is presented to the court purporting to be a will, it must be satisfactorily shown to the jury that the person making it had legal capacity to make it; that it was freely and voluntarily made; that it is a fair and legal expression of the intention; the burden of proof is on the person offering it," was correct as far as it went, the court should have gone further and added, that, when the propounder showed the testamentary capacity of the testator, and that the will was made freely and voluntarily, then the onus was changed, and the burden of proof was on the caveators to make their grounds of objection good. In the case under consideration, it appears, from the charge of the court contained in the record, that the instruction complained of was carefully qualified in accordance with the decision just above cited.

3. The motion for a new trial also complained of the admission in evidence of various declarations made by the testator after the date when the paper purporting to be his will appears to have been executed. One of these declarations was to the effect that he had not made a will; two others were that he never made a will in his life, and the other was that he understood there was what was supposed to be a will he had made in Greensboro, and he wanted the person to whom the declaration was made to bear witness, if he [the testator] had signed such a paper, he didn't know anything about what he was doing. These declarations were admissible, not as evidence of the facts which they purported to declare, nor as evidence that any fraud was practiced upon the testator, or any undue influence exercised over him, nor as evidence of a revocation of any will that he might have made, but as

tending to show the state of his mind when the paper purporting to be his will was executed and whether he then had sufficient capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another. *Dennis v. Weeks*, 51 Ga. 24; *Mallery v. Young*, 94 Ga. 804. The court very carefully and fully instructed the jury as to the purpose for which these declarations were admissible, and the purposes for which they were not admissible, and plainly told them that such declarations could not be considered as evidence to show that the paper was not executed, or that fraud and undue influence were practiced upon the testator, or for the purpose of revoking the will, and that these declarations were no proof of the facts stated therein. There was no error in admitting them for the purpose to which the court limited their consideration by the jury.

The other grounds of the motion are the general ones and grounds of the same nature, complaining that the verdict was contrary to various quoted extracts from the charge of the court.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

OGBURN *et al.* v. ELMORE, ordinary.

123	677
128	303

1. The general local option liquor law (Political Code, § 1546) confers upon the superior court as a court jurisdiction to hear and determine a contest of an election held under the provisions of that law. The question whether the General Assembly could constitutionally confer such authority upon the superior court is not made in the present case, though it is settled that such authority may be conferred upon individuals holding judicial office.
2. The proceeding for contest under the general local option liquor law is not an action at law, or a suit in equity. It is a special statutory proceeding, conferring power which must be exercised within the limits and by the method prescribed by the statute.
3. Such a proceeding can not be annexed to a suit at law or a case in equity; nor can a suit in equity be converted by amendment into a proceeding for contest under the statute.
4. The petition in the present case, properly construed, sets forth a suit in equity, and not a proceeding to contest an election held under the provisions of the general local option liquor law.
5. It has heretofore been determined that there was no equity in the original petition. While the amendment by which certain allegations in that petition were sought to be stricken ought to have been allowed, as there would have been no equity in the petition with these allegations stricken, a judgment refusing the amendment and dismissing the petition will not be reversed.

Argued July 11, — Decided August 3, 1905.

Equitable petition. Before Judge Littlejohn. Macon superior court. November 22, 1904.

Ogburn and 293 others, in a petition addressed to the superior court of Macon county, made the following allegations: On July 9, 1904, a petition was filed with the ordinary of that county, for the purpose of bringing on an election to determine whether such spirituous liquors as are mentioned in the Political Code, § 1548, should be sold within the limits of Macon county. Elmore, the ordinary, upon the filing of the petition, passed an order submitting the question to the qualified voters of the county as required by law, and further ordered that notice of the election should be published in a named public gazette the requisite number of days. Although the order was passed on July 9, the notice was not published until July 15 and appeared only in the issues of a gazette dated July 15, 22, and 29, and only 15 days elapsed from the first to the last insertion; the first notice being published only 24 days before the time fixed for the election. On the day named in the order the polls were opened at the different precincts in the county, and a pretended election was held. On August 9, the day following the pretended election, the managers at the different precincts returned to the ordinary all the papers required to be returned at a lawful election, and the ordinary made an attempt to consolidate the returns, and, after such consolidation, did declare that a majority of the votes had been cast against the sale, and on the same day did publish for the first time the result of the election as declared by him, and is proceeding to publish the same once a week for four weeks. Unless the ordinary is enjoined from perfecting the result of said illegal election, the effect of the publication will be to make illegal the sale of liquors, at least until the order is reversed or set aside. Petitioners are citizens and taxpayers and interested in the revenue arising from the sale of liquors, and six of them (named) are engaged in the sale of spirituous liquors and will be deprived, by the illegal order, of their property, being compelled to close their places of business. Petitioners are without a remedy except in a court of equity and by the State's writ of injunction. The result as declared by the ordinary is not the true result of the election. A majority of the votes cast at the election was for the sale. At one of the precincts there were 39 votes for the sale and 12 against the sale, and the

ordinary wilfully and fraudulently rejected this precinct from the consolidation. At another precinct there were 197 votes for the sale and 203 votes against the sale. Notwithstanding the election at this precinct was not held at the proper place, the ordinary in the consolidation counted these votes. A large number of registered votes, to wit 467, were deprived of their right to cast a legal ballot at this precinct, on account of the failure to establish and open a legal voting place in the district. At another precinct 51 votes were cast for the sale and 66 votes against the sale. These votes were counted in the consolidation, notwithstanding one of the managers at the precinct was neither a freeholder nor officer authorized by law to hold an election. This was also true of one of the managers at the second precinct above referred to. The petitioners constitute more than one tenth in number of those who voted at the election, and the petition is filed within twenty days from the day the ordinary declared the result. The prayer was that the judge direct three justices of the peace to recount the ballots at the three precincts above referred to, and report the result of the recount at the next term of the superior court to which the petition was made returnable; that the writ of injunction be directed to the ordinary, enjoining and restraining him from any further publication of the result of the election, and from in any manner attempting to enforce or carry into effect any order made by him in reference to declaring the result of the election; and that process issue, requiring the ordinary to be and appear at the next term of the superior court to be held for the county, to answer the complaint.

The petition was verified by the oath of one of the petitioners. Upon being presented to the judge, the same was sanctioned and ordered filed, and a rule nisi was issued requiring the ordinary to show cause on a named day why the injunction prayed for should not be granted. It was further ordered that three named justices of the peace recount the votes at the three precincts referred to in the petition. Attached to the petition as an exhibit was a copy of the notice of the ordinary of the result of the election as declared by him, from which it appeared that upon a consolidation there were cast 547 votes for the sale and 570 against the sale, and the result of the election was declared as being against the sale. Process was duly issued, and the ordinary

acknowledged service of the petition in the usual form of acknowledgments of service upon petitions in equity, following this acknowledgment with the statement that he also acknowledged service "of the filing of said petition for contest," and the order of the judge requiring a recount of the votes at the three precincts, waiving "all further notice of the filing [of] said petition for contest." At the time fixed for the hearing of the injunction the defendant appeared and filed a demurrer and an answer; and, after hearing evidence and considering the pleadings, the court refused to grant the injunction prayed for. This judgment was affirmed by the Supreme Court. *Ogburn v. Elmore*, 121 Ga. 72. When the case was called at the term of the court to which the petition was returnable, the plaintiffs offered to amend the petition by striking out the allegations that they were citizens and taxpayers and interested as such in the revenue arising from the sale of liquors, that some of them were directly interested in the sale, and all references to and the prayer for injunction. The court refused to allow this amendment, and the plaintiffs excepted. The plaintiffs then offered a further amendment, in which it was alleged that the judge on a given day had passed an order requiring three justices of the peace to recount the ballots in the election, and that such recount had been had and a return made to the next term of the superior court after the institution of the contest; and wherein it was sought to amend the prayer by asking for a recount of the ballots and a return of the result to the court. This amendment was also disallowed, and the plaintiffs excepted. The court then heard the demurrers and dismissed the petition, and the plaintiffs excepted.

J. H. Hall, M. D. Jones, and L. E. Heath, for plaintiffs.

Hall & Wimberly and Greer & Felton, for defendant.

COBB, J. The general local option liquor law provides that within twenty days from the day on which the ordinary declares the result of the election, one tenth of those who voted at the election may institute contest proceedings in the superior court in the manner provided in the act; that upon the institution of such a contest the judge shall direct three justices of the peace of the county to recount the ballots on a given day and report the result to the next term of the superior court, or to the term to which the petition is made returnable, at which term the con-

test must be heard, if such term is held, and if not, then at the next regular term of the court; that a continuance or postponement of the contest shall not be had for any other reason than the failure to hold the term to which the contest is returnable; and it is provided that if any of the parties die, it shall not be necessary to make the legal representatives of the deceased parties to the case. Provision is made for the summoning of witnesses and the hearing of evidence. The finding of the superior court on the contest is referred to as "the judgment of the superior court," and is declared to be final unless the case is carried to the Supreme Court for review. Political Code, § 1546. Express authority is thus conferred upon the *superior court* as a court to hear the contest. The authority is not conferred upon the *judge*, but upon the *court*; and the act expressly declares that the action of the superior court, denominated as the judgment, may be reviewed by the Supreme Court. What is the status of such a proceeding when instituted in the superior court?

The superior court is a constitutional court, and jurisdiction is vested therein by the constitution for the hearing and determining of civil and criminal cases. It has original jurisdiction in regard to certain classes of civil cases and appellate jurisdiction in regard to other classes. It has exclusive jurisdiction of certain classes of civil cases, as well as of certain criminal cases, and it has concurrent jurisdiction with other courts of civil and criminal cases of given classes. The superior court as created by the constitution is a court for the determination of civil and criminal cases. The manner in which these cases shall be heard and determined, so far as it is not prescribed in the constitution, is left to the determination of the General Assembly. The constitution confers upon the superior court and upon the judge authority to exercise, in certain instances, powers which would ordinarily be exercised by the executive or legislative department of the State, as where the judge is authorized to appoint a notary public who is ex-officio a justice of the peace, or where the superior court is authorized to grant charters to corporations of a given character. There is nothing in the constitution which confers upon the superior court as such the right to hear and determine contests of elections. The question whether there is in the constitution anything which would prohibit the superior court as a court from entertaining jurisdiction of such con-

tests is not made by the present record and need not be inquired into. Whatever doubts may have heretofore existed as to the power of the General Assembly to confer upon persons holding judicial offices the authority to hear contests of elections, it seems to be now settled that this power can be conferred upon these individuals, notwithstanding their relation to the judicial department of the government. See *Johnson v. Jackson*, 99 Ga. 389; *Skrine v. Jackson*, 73 Ga. 382. See also, in this connection, *Mayor v. Perry*, 114 Ga. 881. And when such authority is conferred upon a person holding a judicial position, and there is no provision of law for a review of his decision, it is final. *Carter v. Jones*, 96 Ga. 280. Whether in a case where a matter of this character is referred to the decision of the superior court the right of the Supreme Court to review its decision would arise under the constitution, in the absence of an express provision in the act, need not be decided, for the reason that the act under consideration in express terms provides for such review, and no question was raised as to the validity of this provision. There may be grave doubts as to the expediency of conferring upon persons holding judicial office, and upon the courts as such, the right to determine those questions which are of a political nature, and which could with more propriety be determined by the political department of the government. But if the General Assembly has the authority to confer this power upon such officers, or upon the courts, the question of expediency is addressed to their sound discretion and judgment. Treating the act as authorizing the superior court as such to hear the contest, and that provision authorizing a review by the Supreme Court as being a valid exercise of power by the General Assembly, the question which now confronts us is, does this legislation make the proceeding in the superior court partake of the nature of the ordinary case instituted in that court under its well-defined and undoubted constitutional jurisdiction? Civil cases of which the superior courts have original jurisdiction are either cases at law or cases in equity, that is, cases in which the court is called upon to render a judgment according to the principles of the common law, or to enter a decree according to the established principles of the court of chancery. It is impossible to classify the proceeding to contest the election either as a case at law or as a case in equity. The proceeding is one in its nature

and effect unknown to the jurisdiction of either a common-law or equity court. It is a proceeding peculiar in its nature, of which the superior court would have no jurisdiction in the absence of a statute expressly conferring it. It stands alone and isolated, and in the determination of the questions therein raised the court is called upon to exercise neither its common-law nor its chancery powers, but to exercise simply the power conferred by the statute within the narrow limits therein prescribed. Such being the case, it must be instituted in the manner thus prescribed, and must not be joined or united with any other matter of controversy, even between the same parties, of which the superior court may have jurisdiction either as a court of law or as a court of equity. It can not be annexed to a law case, nor can it be made a part of an equity case. Equitable relief can not be sought in the proceeding; and legal relief can only be sought to the extent that the statute authorizes it, and no further.

It now becomes necessary for us to determine what was the character of the proceeding which was instituted by the plaintiffs in the present case. Was it an appeal to the superior court as a court of equity, for the exercise by that court of some of its equity powers? Or was it a contest instituted under the provisions of the general local option liquor law (Civil Code, § 1546)? The petition has in it some allegations which would be appropriate to a petition for a contest; but in the prayer for a recount the plaintiffs do not ask for that which the law says shall be required in a contest, that is, for a recount of the entire vote cast in the election, the prayer being simply for a recount of the vote cast at three precincts. It is addressed to the superior court. This would be appropriate in a petition for contest as well as in a petition for equitable relief. The allegations in reference to the conduct of the ordinary, so far as the notice of the election and the consolidation of the returns are concerned, would be appropriate in either proceeding. The statement as to the ratio which the number of the plaintiffs bore to the number of voters at the election would indicate that it was the intention of the plaintiffs to contest the election. That the petitioners are citizens and taxpayers and that some of them are interested as sellers of liquor, and therefore interested as such in the action of the ordinary, are averments wholly foreign to a contest but are appropriate to a petition for equitable relief. This is also true in ref-

erence to those allegations as to the injunction and the prayer for the granting of the same. The petition prays for process, which is a prayer wholly unnecessary and improper in a petition for a contest. The ordinary in his acknowledgment of service seems to have treated the petition as of a dual nature, but the construction placed by him upon the petition is of course immaterial. The petition was presented to the judge as a petition for equitable relief, and was sanctioned as such. A hearing was had that would be had upon such a petition, and the case was brought to this court and heard upon a fast writ of error in the same manner that an ordinary injunction case would be disposed of. Considering the petition as a whole, as well as the manner in which the same has been dealt with by counsel and by the judge of the superior court, no other conclusion can properly be reached than that it was intended, when filed, as a petition for equitable relief. So construing it, those allegations which would be appropriate only to a petition for a contest were merely surplusage, and, even if not stricken, could be ignored. The judge therefore properly refused to allow the amendment which sought to convert the petition into a proceeding for contest by making allegations in reference to a recount of the ballots which were not made in the original petition. But we think the judge erred in refusing to allow the amendment striking out those portions of the petition relating to the prayer for injunction. In all cases, both at law and in equity, the plaintiff has a right, which is not subject to any limitation, to strike out any averment that he sees proper, and the court must allow the amendment. If this amendment had been allowed, however, the petition would have been left with nothing in it with which the superior court as a court of equity could deal, and therefore could have been stricken from the files either on motion of counsel or by the court on its own motion. The amendment should have been allowed, and then the case dismissed for want of equity in the petition. There was no equity in the petition as originally filed. *Ogburn v. Elmore*, supra. There would certainly have been no equity in the petition if the amendment had been allowed; and the erroneous disallowance of the amendment will not work a reversal of the judgment.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

ROBERTS *et al.* v. HEINSOHN.

1. This court will not consider as evidence affidavits and documents specified in a bill of exceptions as material to a clear understanding of the errors complained of, which are not incorporated in an approved brief of the evidence, but are brought to this court in the transcript of the record merely as independent papers under the certificate of the clerk that they are of file in his office.
2. The writ of error will not be dismissed, but the case will be retained for a consideration of such questions as do not depend upon the evidence for determination.
3. The petition for injunction was legally sufficient to support the judgment rendered thereon.

Argued June 20, — Decided August 3, 1905.

Injunction. Before Judge Spence. Worth superior court.
April 25, 1905.

Payton & Hay, for plaintiffs in error.

Perry & Tipton, contra.

CANDLER, J. This case comes up on exceptions to the grant of an injunction. On the call of the case in this court counsel for the defendant in error moved to dismiss the writ of error, on the ground that none of the evidence was incorporated in the bill of exceptions, and no approved brief of the evidence was brought up in the transcript of the record, and that the petition and answer made no law points to be adjudicated without reference to the evidence. It appears that the statement as to the evidence is correct, and that in lieu of a brief of the evidence the plaintiff in error had sent to this court in the transcript of the record a set of detached affidavits and documents, each bearing the date that it was filed in the clerk's office, but without any effort to brief the evidence, and without any approval or verification by the trial judge. Of course these affidavits and documents can not be considered by this court as evidence, but will be disregarded entirely. *Braswell v. Brown*, 112 Ga. 740; *Bond v. Winn*, 113 Ga. 18; *Eubank v. Eastman*, 120 Ga. 1048. The fact, however, that there is no evidence before this court will not work a dismissal of the writ of error, for the reason that the bill of exceptions calls in question the legal sufficiency of the petition to furnish a basis for the equitable relief sought and granted. The suit was in effect an action to enjoin a trespass. It was not, as contended by counsel for the plaintiff in error, an effort to substitute the

equitable remedy of injunction for the common-law action of ejectment; for the plaintiff alleged in himself both title and possession, and sought only to prevent an alleged trespass on his premises by the defendants. Nor is there any merit in the contention that there was no allegation of irreparable damages. Such damages were distinctly alleged, and the fact that it was also alleged that the money value of the injury already sustained by him was "\$1,000, or other large sum," does not negative the idea that the damage done and threatened was irreparable, but was merely an approximation of the extent to which he had already suffered. This case is therefore distinguishable from that of *Ocmulgee Lumber Co. v. Mitchell*, 112 Ga. 528. For none of the reasons assigned in the bill of exceptions was the petition defective; and as we are unable to pass upon any of the questions involving a consideration of the evidence, an affirmance of the judgment must result.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

BAXLEY v. BAXLEY et al.

CANDLER, J. The plaintiff in error not having insisted on any of the grounds of his motion for a new trial except those which complain that the court erred in charging on the subject of notice in the plaintiff of the defendants' deed, and it appearing that the charges complained of stated sound principles of law and were warranted by the evidence, the judgment overruling the motion will not be disturbed.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 21, — Decided August 3, 1905.

Complaint for land. Before Judge Roberts: Appling superior court. December 15, 1904.

Thomas & Parker, for plaintiff.

W. W. Bennett and *N. J. Holton*, for defendants.

VAN DYKE v. VAN DYKE.

1. It was held in *Lenney v. Finley*, 118 Ga. 718, that "The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal."

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124	967

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Case 2	
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130	811

2. This court declines to overrule that decision.
3. If one lends money to another on his own credit, and takes therefor at the time a promissory note under seal, payable to the lender's order, the lender can not afterwards disregard such note, and render a third person liable for the money loaned, on the ground that such person was the principal of the borrower, which fact was unknown to the lender at the time when the loan was made.

Argued June 22, — Decided August 3, 1905.

Complaint. Before Judge Reid. City court of Atlanta.
June 8, 1904.

Mary J. Van Dyke brought suit against Alice M. Van Dyke, alleging, in brief, as follows: The defendant is indebted to the plaintiff in the sum of \$1,440, besides interest, which indebtedness was created as follows: On April 25, 1899, E. A. Van Dyke, the husband of the defendant, who the plaintiff knew, had been the owner of 32 shares of the capital stock of the Merchants National Bank, of St. Paul, Minnesota, came to the plaintiff and informed her that the stock had been assessed forty-five per cent. of its face value, and that it was necessary, in order to prevent it from being sold, to pay the assessment and that he should send to the bank at once the amount of the assessment, and requested plaintiff to lend him the sum for that purpose. Plaintiff loaned him the amount, and the money was used in paying off and discharging the assessment on the stock. The stock was in fact then standing on the books of the bank in the name of the defendant. It was afterwards sold, and the proceeds were sent by a check payable to the order of defendant, and were used, as defendant claims, by her, to the extent of \$1,400 in paying for certain improvements on land which she claims to own. At the time the loan was made, the plaintiff did not know that the stock stood in the name of the defendant, but believed that it belonged to her husband. Believing him to be the true owner, she took from him a note for the amount of the loan. A copy of the note is attached to the declaration. She has since learned that at the time she made the loan Van Dyke was acting as agent for his wife in borrowing the sum to pay off the assessment on the stock. Plaintiff elects to proceed against the defendant as the undisclosed principal for whom the money was borrowed. "By reason of the facts aforesaid defendant became liable to plaintiff in the sum of \$1,440 besides interest." The copy of the note attached to the

declaration showed it to have been a note under seal, payable to the order of the plaintiff, and signed by E. A. Van Dyke, with nothing on its face referring to defendant. On motion the court dismissed the action, on two grounds: first, that the declaration set out no cause of action, for the reason that the allegations disclosed that it was based on a contract under seal, and in such a case the law would not permit the plaintiff to proceed against the undisclosed principal when discovered; and second, that the allegations of the petition disclosed that the plaintiff parted with her money on an express contract under seal, and no action can be maintained against the defendant for money had and received. The plaintiff excepted.

R. O. Lovett, and *W. W. Haden*, for plaintiff.

Culberson & Johnson, for defendant.

LUMPKIN, J. (After stating the facts.) The general rule with reference to holding an undisclosed principal liable upon the contract of his agent is thus stated in the Civil Code, § 3024: "If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent." This is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. In *Lenney v. Finley*, 118 Ga. 718, it was held that "The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. Accordingly, a lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although it appears from extrinsic evidence that the lessee was the general agent to conduct a business for his principal, and that the premises were leased to be used in such business." We are asked to review and reverse this decision; but the court declines to change the ruling then made. An examination of the authorities cited in the opinion will show that it was not without foundation. In *Merchants Bank v. Central Bank*, 1 Ga. 418, it was said: "In the execution of instruments under seal, by an agent, the general rule is, that it must purport, upon its face, to be the contract of the principal, and

his name must be inserted in it, and signed to it." See also *Compton v. Cassada*, 32 Ga. 428 (compare *Tenant v. Blacker*, 27 Ga. 418; as to the execution of a power, see *Terry v. Rodahan*, 79 Ga. 278); *Graham v. Campbell*, 56 Ga. 258. In 1 Am. & Eng. Enc. L. (2d ed.) 1141, it is said: "It has been laid down as a common-law doctrine, that when a contract is made by an instrument under seal, no one but a party to the instrument is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be in the name of the principal, in order that he may be a party, because otherwise he is not bound by it. . . . Some of the later decisions, however, qualify this doctrine by holding that when a sealed contract has been executed in such form that it is in law the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the instrument will be binding on the principal." In the note attached to the declaration there is nothing to indicate that it was executed by Van Dyke as agent, or that his wife was in any way connected with it. Indeed no reference to her or to any agency is made in the paper. See *Briggs v. Partridge*, 64 N. Y. 357; *Mechem on Agency*, §§ 701, 702, and note; *Clark on Contracts*, § 275, p. 519; *Bishop on Contracts*, §§ 426, 1070; *Evans v. Wells & Spring*, 22 Wend. 324, in which several interesting opinions were filed. Some courts hold that negotiable instruments do not fall within the general rule and that an unnamed principal can not be sued on them. See *Clark on Contracts*, § 275 (p. 519) and notes. It is contended that the rule applies only to instruments which were specialties at common law, as to which a seal was necessary; and that in cases where the instrument would be valid without a seal, the addition of a seal would not bring it within the rule. There are some authorities holding or tending to hold this to be the rule. See *Stowell v. Elred*, 39 Wis. 614; *Wagoner v. Watts*, 44 N. J. Law, 126; *Shuetze v. Bailey*, 40 Mo. 69, 75. The distinction drawn in this line of authorities, however, has not been followed in Georgia. In the case of *Lenney v. Finley*, supra, the instrument under considera-

tion was a lease for a term less than two years, which under our law conveyed no interest in land, and could have been executed without any seal. In *Rowe v. Ware*, 30 Ga. 378, it was held that "The signature of a sealed instrument by an agent, the principal not being present, is not binding on the principal, unless the authority of the agent be under seal." In the body of the opinion it is said: "But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was, whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is—*sealed* as it is. Whether a bond without a seal (to use, for convenience, a short but inaccurate phrase) would be valid, has nothing to do with the case, for there was no such paper in the case." This was reaffirmed in *Overman v. Atkinson*, 102 Ga. 750.

It is further contended that a note under seal does not fall within this rule. At common law a note under seal was unknown. Such an instrument more nearly approximated a "single bond." Broom's Common Law (9th ed.) 272, 484; *Sivell v. Hogan*, 119 Ga. 170. It is unnecessary to discuss the exact status of a sealed note. In *Albertson v. Holloway*, 16 Ga. 377, its nature was considered, and it was held that a plea of failure of consideration could be made to a suit based on it. In other cases there have been intimations that a presumption of a consideration arose from the presence of a seal, but that it might be rebutted. See *Neil v. Bunn*, 58 Ga. 583; *Simms v. Lide*, 94 Ga. 553. In *Weaver v. Cosby*, 109 Ga. 310, Mr. Justice Lewis said that an instrument then before the court, being under seal, "raised a strong presumption of law" that it was founded upon a consideration. In *Sivell v. Hogan*, 119 Ga. 167, 169-170, the opinion was strongly expressed, although no direct ruling was made, that a seal raises a conclusive presumption of the existence of a consideration at the time the contract was entered into, but not that it has not since failed, either wholly or partially; and accordingly that want of consideration can not be pleaded, but failure of consideration may be. Whether the presumption thus raised is disputable or conclusive, the fact of being under seal gives to the note a character which it would not have otherwise. Moreover, the statute of limitations in regard to a note under seal and one

without a seal is not the same. Civil Code, §§ 3765, 3767. Section 3634 of the Civil Code reads as follows: "A specialty is a contract under seal, and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than ordinary simple contracts." Under the strict commercial law prevailing in some jurisdictions, a note under seal and payable to a named person or order is deemed not negotiable, but in this State it is treated as negotiable. *Farrar v. Bank of New York*, 90 Ga. 331; *Porter v. McCollum*, 15 Ga. 528. It is apparent that a note under seal occupies a different position in several respects from one which is not so. Hence it is not to be treated merely as a simple contract, and the seal rejected as surplusage. We think it does fall within the rule announced in *Lenney v. Finley*, supra. From what has been said it follows that the plaintiff could not have recovered against the defendant on the note given by the husband of the latter.

3. It is contended, however, that whether the plaintiff can recover on the note or not, she has a cause of action against the defendant aside from the note; under the facts alleged. The case of *Farrar v. Lee*, 10 N. Y. App. Div. 130, was very similar to that now under consideration. It is there said, "That the liability rested entirely upon the bond, in which any preliminary contract was merged; that, as the bond was signed by Tanner [the agent] in his own name, and not as agent for Lee [the principal], it was not competent to transfer by parol evidence, or in any other way, from Tanner to Lee, the obligation which Tanner had assumed personally." In the case of *Lenney v. Finley*, supra, it was contended that if the concealed principal was not liable on the contract of lease by reason of its being under seal, nevertheless, having occupied the premises and used them for the purpose of conducting business, she was liable to the plaintiff. This contention was denied by the court. In the case of *Maddox v. Wilson*, 91 Ga. 39, no opinion was written. The third headnote appears to conflict with the ruling here made. The decision was made by two Justices, and not by a full bench; and was disapproved in *Lenney v. Finley*, supra. Under the allegations of the petition the trial court committed no error in sustaining the demurrer.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

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WESTERN AND ATLANTIC RAILROAD CO. v. BRANAN.

1. To properly bring under review the correctness of a ruling as to the admissibility of evidence which a trial judge declines to exclude, the complaining party must make it appear not only that the evidence was admitted over his objection, but also what grounds of objection he urged at the time the evidence was offered.
2. In an action to recover damages of a warehouseman because of an alleged failure on his part to comply with the duties imposed upon him by law with respect to the proper storage and care of goods entrusted to his care, the plaintiff must recover, if at all, upon proof of the specific acts of negligence which he sets forth in his pleadings, and the trial judge should not, in his charge to the jury, give the plaintiff the benefit of any theory of recovery not covered by the allegations of his petition.
3. If the plaintiff fails to sustain by evidence a charge of negligence made against the defendant, the judge should eliminate this feature of the case when instructing the jury as to the issues upon which they are called to pass, and not leave them to determine whether the defendant was negligent in the respect alleged but not proved.
4. In so far as the written requests to charge, presented by the defendant in this case, were pertinent and in accord with the law controlling the questions at issue, they were substantially covered by the charge which the judge gave of his own motion.

Argued June 22, — Decided August 3, 1905.

Action for damages. Before Judge Reid. City court of Atlanta. September 24, 1904.

In the latter part of the year 1899, Charles I. Branan entered into an arrangement with the Western and Atlantic Railroad Company, whereby it was to transport over its line of railway a quantity of dried fruit which he had purchased in California, and, upon the arrival of the fruit in Atlanta, to store the same for a few months in a warehouse it had leased in what was known as the Austell building. During the month of October, five carloads of dried peaches were transported to Atlanta and stored in the company's warehouse, wherein the fruit remained till the spring of 1900. In the latter part of February, Branan went to the warehouse to get samples of the peaches, with the view to placing the fruit on sale in the market. He found the fruit damaged, some of it being dried up and shriveled, and part of it "gummy" and caked together. Between March and June so much of the fruit as was marketable was sold, the price received being far below that which it would have brought if in first-class condition. To recover the loss sustained by reason of the de-

terioration in the quality of the peaches, Branan brought suit against the railway company, basing his right of recovery upon the following allegations of fact: As an inducement to the plaintiff to have the fruit transported over its line of railway, the company represented that it could store the fruit in Atlanta, where it had ample, safe, and proper warehouse facilities. Upon the arrival of the fruit, it was examined by the plaintiff and found to be in a good and merchantable condition and without defect. The warehouse in which the company stored the peaches was not a suitable place for the storage of fruit, in that it was situated in an office building, directly over the engine-room, in which a high degree of heat was maintained, the temperature being sometimes as high as 114 degrees. As a result of this excessive heat maintained in the basement, which was communicated to and through the floor of the wareroom at the place where the peaches were stored, they were heated and cooked and caused to sweat and expand. Large pipes, used in conveying heat to the upper floors of this office building, ran through the wareroom and along its walls, increasing the temperature of heat caused by the fires maintained in the basement, and rendering the storeroom an improper and unsafe wareroom for the storage of dried fruit. The peaches, which were packed in sacks, were negligently piled in great masses, sack upon sack, without any opportunity for the air to penetrate them; and the peaches in the sacks lying on top of the piles were dried almost to a crisp, while the peaches in the sacks placed on the inside and in the middle of these piles seemed to be melted and run together in cakes and in lumps. To in this manner store the fruit was especially negligent in view of the excessive heat maintained in the storeroom. The defendant was aware of the character of the storeroom and knew of the heating apparatus which rendered it a dangerous and unsafe wareroom for the storage of fruit, whereas the plaintiff was ignorant of the surrounding conditions. The company, after holding itself out as a warehouseman having a place reasonably well suited for the storage of such fruit, negligently failed to furnish a proper storeroom, and placed the fruit in a wareroom which was unsafe and ruinous to the fruit. The damage to it would not have resulted but for the superheated condition of the warehouse, for otherwise it would have kept fresh and sound; and the defendant company

was negligent in storing the fruit there, and, after receiving it, should either have kept the wareroom at a proper temperature or have notified plaintiff of the probable damage, which it failed and neglected to do. The loss he sustained by reason of the negligence aforesaid amounted to the sum of \$7,578.73, and resulted from the lack of ordinary care on the part of the defendant company in handling the peaches stored with it.

The jury returned a verdict in favor of the plaintiff for the sum of \$3,629.74. The company made a motion for a new trial, which was overruled and it excepted.

Payne & Tye, for plaintiff in error.

Mayson, Hill & McGill, contra.

EVANS, J. (After stating the facts.) 1. Error is assigned upon the admission in evidence, over the defendant's objection, of certain receipts issued to the plaintiff by the defendant company as a warehouseman, and also five "expense bills" issued to him by the Nashville, Chattanooga & St. Louis Railway, showing the weight of the peaches. What objection was urged against the introduction of this evidence at the time it was offered does not appear, and for this reason the assignment of error can not be considered. *Powell v. Railway Co.*, 121 Ga. 803.

2. Exception is taken to a charge of the court in which the judge submitted to the jury, as one of the contentions of the plaintiff, the question whether or not the company was negligent in failing "to admit air into the warehouse, in view of its heated condition, in a proper way and at proper times and periods." The complaint made of this charge is that there was no allegation in the petition upon which the same could be predicated; the plaintiff did not in point of fact so contend, and the charge presented to the jury an additional ground of negligence in no way claimed by the plaintiff himself. The assignment of error upon this instruction is well taken. The allegations of negligence upon which the plaintiff based his right of recovery were, (1) that the company undertook to store his peaches in a wareroom which it knew was not suitable, because of the heat generated in the basement below and communicated to and through the warehouse; and (2) that the peaches were piled in huge masses, sack upon sack, so that the air could not penetrate them. The plaintiff confined himself to an effort to prove the first of these two.

charges of negligence, by showing that the wareroom was so situated, relatively to the engine-room, that a man of ordinary care and observation should have known that the excessive heat generated in the basement rendered the wareroom an improper place for the storage of dried fruit, inasmuch as the high temperature would inevitably cause the peaches to be heated and cooked on the outer surfaces of the piles, and to sweat and expand in the middle of the piles, where the air did not circulate. The evidence disclosed, incidentally, that there were doors and numerous windows upon two sides of the wareroom; but no attempt was made to show whether the company did or did not use the means at its command to ventilate the warehouse, nor was there any testimony to warrant the conclusion that, had proper precautions in this respect been taken, the temperature therein could have been regulated and reduced to a normal degree of heat, notwithstanding its alleged ill-chosen location and want of adaptability to the use to which it was put. The instruction complained of gave to the plaintiff the benefit of a theory which he did not plead nor undertake to prove. As to whether the heat generated in the basement of the building was such as to make the wareroom an unsafe and unsuitable place for the storage of hay, grain, dried fruit, and other commodities which would suffer injury if subjected to an excessive temperature, the testimony was painfully conflicting; and the jury may have found that, whatever might be the truth in this regard, the company had not shown any effort to obviate loss to its patrons by at least attempting to maintain a normal temperature in the wareroom by means at its command to insure proper ventilation.

3. The presiding judge also submitted to the jury the question whether or not the defendant company "was further negligent in the manner in which it stored the peaches, in that they were piled in great masses, sacks upon sacks, without any opportunity for the air to penetrate them." As is pointed out by counsel for the plaintiff in error, there was no evidence to sustain the charge of negligence made against the company with reference to the manner in which the sacks of peaches were piled. The testimony showed that the peaches were piled in the usual way, and several of the plaintiff's witnesses, who professed to be experts on the subject of handling dried fruits, expressed the opinion that peaches so

piled in bulk would keep better than they would if the sacks were kept apart and the air permitted to circulate freely among them, as when so stored the peaches would dry out and lose in weight. The plaintiff himself testified that there was no particular way for storing peaches of this kind; that the fruit would keep either way, and in his opinion the manner of piling had very little to do with the matter, though when piled in rows the sacks would absorb the moisture in the air and the fruit would be pliable and more saleable. He did not pretend that the manner in which his peaches were piled caused any injury to them, but attributed their unmarketable condition solely to the high temperature which he claimed was produced in the warehouse because of the heat maintained in the engine-room, immediately above which the major portion of the peaches were stored.

4. The court was requested by the defendant's counsel to charge the jury: "If you believe from the evidence that the peaches stored by the plaintiff in the warehouse were injured by reason of the steam pipes running through and on the walls of said warehouse, but that said pipes were there at the time the plaintiff was storing his fruit, and if you further believe the condition of the pipes was perfectly apparent and entirely manifest to any one visiting said warehouse, then I charge you that the plaintiff is presumed in law to have acquiesced in such condition of affairs and is bound by all the consequences naturally flowing from the ordinary use of these steam pipes." The court properly declined to give this request to charge. It was framed on the theory that the proposition therein stated would be true independently of whether Branán had ever visited the warehouse or had any opportunity to note surrounding conditions. He certainly could not be presumed to have acquiesced in the condition of affairs unless he either knew or had an opportunity to know of the presence of these pipes and the use to which they were put. Whether his opportunities for becoming acquainted with the premises were such as to charge him with notice that the pipes rendered the wareroom an unsuitable place for the storage of his fruit was peculiarly a question for the jury to determine. Furthermore, the request to charge ignored the plaintiff's contention that the excessive temperature was caused principally by the undue heating of the floor of the wareroom by the fires maintained

in the engine-room directly underneath, and assumed that the damage to the fruit was caused solely by the heat given off by the steam pipes which passed through the storeroom. The evidence did not support any such theory of the case. The testimony introduced by the plaintiff was to the effect that the damage to the peaches was caused principally by piling them on the superheated floor directly above the engine-room, and that the steam pipes were only a minor cause of the damage, inasmuch as the heat they gave off increased the temperature in an appreciable degree. That they of themselves were sufficient to produce the damage and to put the plaintiff on notice that the warehouse was not adapted to the storage of dried fruits does not appear, and the jury would not have been justified in so finding.

The court also declined to give in charge two other written requests presented by the defendant, one to the effect that a warehouseman is not an insurer; and the other embracing an instruction that if the loss in the sale of the peaches was due, not to any depreciation in quality, but to the fact that Branan had purchased peaches in such large quantities as to glut the market and cause a decline in the price of dried fruits, then the company could not be held accountable for such loss. These requests were substantially covered by the charge of the court.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

GEORGIA RAILWAY AND ELECTRIC CO. v. REEVES.

1. Where an action was based on the allegation that a passenger on a car of an electric railway, at the direction of the conductor, was required to change cars, and, while passing from one car to another, she was injured by the negligent conduct of the defendant's agents and servants in connection with such change, an amendment which alleged an additional act of negligence forming part of the same transaction did not set up a new and distinct cause of action.
2. Such an amendment, which alleged that "said jerk of said car was caused by the defendant's servants and agents in charge of said car," was not subject to objection on the ground that it did not connect the alleged negligence with the defendant.
3. If a car is at rest temporarily, and a passenger is lawfully leaving it, or passing from it to another car, under the direction of the conductor, and while this is in progress a sudden and violent jerk or movement of the car is

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caused by the company's agents, resulting in injury to the passenger, it is not necessary to allege in detail by what particular means they caused the jerk to occur.

4. While an independent act of negligence not connected with, contributing to, or causing the injury to a passenger is immaterial, and an amendment alleging such an act is demurrable, yet where the amendment, taken in connection with the declaration, sufficiently shows that the act alleged in it formed a part of the conduct of the defendant's agents from which the injury was alleged to have resulted, there was no error in overruling a demurrer thereto.
5. Where the evidence for the plaintiff in an action for damages tended to show that the injury occurred on the same line of railroad, but at a point some 350 or 400 yards distant from the place where it was alleged in the declaration to have happened, an amendment for the purpose of correcting the allegation so as to make it conform to the evidence, but still referring to the same transaction, and not to a different occurrence, did not add a new and distinct cause of action, and was not objectionable on that ground.
6. If any objection could properly have been made to the allowance of such an amendment, it furnishes no cause for a reversal, where upon further evidence being introduced, which tended to show that the injury in fact occurred at the point originally alleged, the amendment was withdrawn.
7. If a motion for a nonsuit should have been granted at the time when it was refused, yet if the evidence afterwards introduced supplied the deficiency, no reversal will result from such refusal.
8. Where the presiding judge, at one part of the charge on the subject of the presumption arising from proof of injury from the running of the cars of a railroad company, or the acts of persons in its employment, did not limit such presumption to the specific acts of negligence alleged, but in his general charge did clearly and specifically confine the jury to the consideration of such specifications of negligence, this furnishes no ground for a new trial.
9. If a car containing passengers is stopped while in transit, and the passengers are directed by the conductor to change to another car which is on a track parallel to the first, and if while they are so doing the employees of the company put out the lights of the first car, and cause it to jerk suddenly, resulting in injury to a passenger who is in the act of making the change, this would be an injury resulting from the running of the cars of the company, within the meaning of the statute, and would also be a damage done by a person in the employment and service of the company, so as to raise the statutory presumption of negligence against it.
10. None of the other grounds of the motion for a new trial in this case require a reversal.

Argued June 22, — Decided August 3, 1905.

Action for damages. Before Judge Reid. City court of Atlanta. September 17, 1904.

Mrs. Malinda Reeves brought suit against the Georgia Railway and Electric Company to recover damages for a personal injury, alleging, in brief, as follows: She was a passenger on one of

defendant's cars on November 20, 1902, between the hours of five and six p. m. When the car reached a certain point on the line it stopped, and the conductor directed the passengers to transfer from it to another car of the defendant, which stood on the parallel track, and which was to carry the passengers to the end of the journey. The conductor and motorman directed the passengers to step from the car on which they had been riding to the other car. They negligently failed to exercise any care or diligence in assisting passengers, particularly female passengers, like the plaintiff, who was an elderly lady, from one car to the other, and negligently failed to provide any safe means of getting from one car to the other. They negligently failed to stop the car at any proper place where there was a platform or a raised place for passengers to alight, and negligently directed the passengers to step from one car to the other. A number of passengers were in front of the plaintiff, and a number behind, and they were crowding and pressing in the cars from one to the other. Passengers made a step from one car to the other. The conductor and motorman stood by, seeing and directing and permitting this to be done, and permitting the passengers to crowd behind the plaintiff with force and speed. The car on which the plaintiff had been riding had been lighted by electricity, and just as the plaintiff was in the act of undertaking to step from one car to the other the conductor negligently pulled down the trolley pole, and by this method, and by other means unknown to the plaintiff, caused the car to become suddenly darkened, and no sufficient light was thrown out between the cars to enable persons to safely make the step from one car to the other, or to safely judge of the distance; and because the plaintiff was unable to see or discern the landing place or step on the car, and because the passengers behind were crowding and pressing her, with the knowledge of the conductor and motorman, and because no safe landing or passageway from one car to the other had been provided, and because the plaintiff was in no way assisted or guarded or protected, and failed to get a firm footing upon the step of the other car in passing from one car to the other, she fell to the ground and was permanently injured. The nature of the injury was specifically alleged. The defendant admitted that the plaintiff was a passenger on its car; that the car was stopped and the

conductor directed passengers to transfer from it to another car which stood on a parallel track, for the purpose of carrying the passengers into the city of Atlanta. The other substantial allegations were denied. The plaintiff amended her declaration by alleging, that, when she was in the act of stepping from one car to the other, there was a sudden jerk or movement of the car from which she was stepping; that such jerk or movement of the car was negligence on the part of the defendant, and that it was caused by the defendant's servants and agents in charge of the car. This amendment was allowed over objection, and exceptions pendente lite were filed. While the plaintiff was on the stand she testified that the injury occurred, not at Hurt street, as alleged in the declaration, but at a point known as Moreland's station, which other evidence indicated was about 350 or 400 yards distant from Hurt street. Thereupon an amendment was offered and allowed over objection, alleging that the injury really occurred at Moreland station. The plaintiff's evidence was not very clear as to the location, as she stated that she was not familiar with the line. When the defendant's evidence was introduced, it showed positively that the occurrence really took place at Hurt street. The plaintiff then withdrew the amendment previously made, changing the allegation as to the place of the occurrence, and returned to the original allegation on that subject. This also was objected to.

The evidence on behalf of the plaintiff, as to what transpired at the time and place of the alleged injury, was, in brief, as follows: The plaintiff was returning to Atlanta from Decatur, six miles distant, on one of defendant's cars operated by electricity, between six and seven o'clock in the evening. When the car arrived at a place about the outskirts of the city of Atlanta it stopped alongside of another one of defendant's cars, which was on a parallel track. The conductor stated that they had lost their schedule, and instructed the passengers to change to the other car immediately. They were rushed out, and the plaintiff went to step from one car to the other (or, as she expressed it, "went to make my step") when the conductor turned the trolley, the lights went out, and there was a sudden jar of the car, caused by the defendant's agents, which threw the plaintiff to the ground, causing the injury. The evidence for the defendant tended to show the fol-

lowing among other facts: There was an arc light at the junction of Hurt and Decatur streets, used for lighting the city streets. When the two cars were parallel to each other both were still. Owing to a loss of time by the one coming into Atlanta, the schedule was disarranged, and it became necessary for the passengers to transfer to the other car in order that the first might turn back and resume its regular schedule. Both cars remained still while the passengers went from one to the other, and both were lighted. No change was made in the lights at the place, except that the headlight on the first car was made ready to be transferred to the other end of it. To do this a key or stop was taken out which disconnected the electric current from it. The trolley was not moved until after the passengers were transferred. The effect of taking the trolley off the wire would not be to cause the car to move, but to disconnect the current from it and render it impossible for it to move. Both cars were standing still during the transfer. The car was in good running order. One witness for the defendant testified: "The two cars were standing side by side, and the other passengers were stepping from one car to the other, and she went to step across, and it looked like that she stepped on her skirt, and she dropped down there." Neither the changing of the headlight nor the change of the trolley pole could have caused a jerk of the car.

The jury found in favor of the plaintiff five hundred dollars. The defendant moved for a new trial, which was refused, and it excepted. Error was also assigned on the allowance of the first amendment to the declaration.

Rosser & Brandon, W. T. Colquitt, and B. J. Conyers, for plaintiff in error. Arnold & Arnold and Harvey Hill, contra.

LUMPKIN, J. (After stating the facts.) 1. It was contended that the amendment, alleging that while the plaintiff was stepping from one car to the other the defendant negligently caused the car to jerk suddenly, added a new cause of action. This ground of exception is not well taken. The action being based on the allegation that while a passenger, at the direction of the conductor, was passing from one car to another, she was injured by the negligent conduct of the defendant's agents and servants in connection therewith, an amendment which alleged an additional act of negligence in the same transaction did not set out a new

and distinct cause of action. *City of Columbus v. Anglin*, 120 Ga. 785; *Harris v. Central Railroad Co.*, 78 Ga. 525; *Ellison v. Georgia Railroad Co.*, 87 Ga. 699; Civil Code, § 5098.

2. The bill of exceptions pendente lite assigns error in allowing this amendment, on the ground that it "does not connect the alleged negligence with the defendant." It distinctly alleges "that said jerk of said car was caused by the defendant's servants and agents in charge of said car."

3. It was further objected that the amendment did not show in what way the defendant caused said alleged negligence. It was not necessary that the plaintiff should ascertain and allege the particular methods by which the defendant's employees produced a sudden jerk while she was leaving the car. Where a car is at rest, and a passenger is lawfully leaving it or passing from it to another car under the order or at the request of its conductor, if a sudden and negligent jerk or movement is caused by the company's agents, resulting in injury to the passenger, it is not incumbent on the passenger to allege the specific manner in which it was produced. It would be an unreasonable burden to place upon her to require that she should allege and prove whether the motorman turned on the current or turned off the brake, or by what method of handling the complex machinery connected with a car propelled by electricity the jerk was produced. The allegation of the amendment on this subject was sufficient.

4. Objection was further made on the ground that the amendment does not show in what manner the alleged negligence contributed to or caused any injury to the plaintiff. If this amendment stated a new count which should be complete in itself, or if it alleged some act of negligence disconnected from the transaction set forth in the declaration, by reason of which negligence injury to the plaintiff was alleged, the point would be well taken. But we think that under the allegations of the declaration, which show that she was a passenger on defendant's car, that under order of the conductor she was leaving that car and undertaking to step across to another, and that by reason of negligence on the part of the defendant's agents in connection with such transfer she fell and received an injury, the addition of another act of negligence in the same connection might fairly be construed

with the whole declaration as being one of the causes which produced the injury. Taking the amendment, therefore, in connection with the original declaration, while it might have been more explicit, we do not think that it was amenable to this objection.

5, 6. Complaint is made that after the plaintiff closed her evidence, wherein the scene of the injury was located at a point 350 or 400 yards distant from that alleged in the declaration, a motion for a nonsuit was made, and thereupon an amendment was allowed making the declaration conform to the evidence of the plaintiff. It is urged that this set forth a new cause of action. This objection was not well founded. The mere correction of an allegation as to the exact location of an occurrence on the line of a railroad, so as to allege that it in fact occurred a few hundred yards distant from the point alleged in the original declaration, does not add a new and distinct cause of action. It is the same cause of action, nor does it become a new and distinct cause by merely shifting the scene of the occurrence a short distance along the line of the railroad. By doing so there was no difference in the law applicable, or in the evidence necessary to support the substantial grounds of the plaintiff's contention. Even if there had been error in the allowance of this amendment, it could furnish no ground for reversal, because at a later stage of the trial the amendment was withdrawn, and the original allegation restored, the defendant's evidence showing that the occurrence took place at the point alleged in the original declaration.

7. Error is assigned because the court overruled the motion for a nonsuit. If the motion rested on the variance between the allegata and probata with reference to the place at which the injury occurred, the making of an amendment which caused the former to conform to the latter destroyed the right to a nonsuit, if it existed. If, however, we should consider the case as if the amendment which was afterwards withdrawn had not been made, and that there was an error at the time when the motion was made in not granting the nonsuit, yet, if the evidence afterwards introduced supplied the deficiency, no reversal will be granted on that ground. Here the evidence of the defendant clearly showed that the occurrence transpired at Hurt street, the place alleged in the declaration.

8. The motion for a new trial assigns error in the following

charge: "Now, in this investigation, gentlemen, if the plaintiff makes it appear to you from the evidence in the case that she was injured in the manner that she sets forth in her declaration, the law would presume then that the defendant was negligent, and the burden would be cast upon the defendant to show to you either that it was not negligent, or else the injury to the plaintiff, if she was injured, was due to accident and not caused by the defendant's negligence, or else that the plaintiff by ordinary care on her part could have avoided the consequences to herself of the defendant's negligence, if that is shown. If the defendant makes either of these propositions appear, that would be a reply to the presumption and make a complete defense to the action." The grounds of complaint in respect to this charge are: that it was without basis in the evidence; that the charge as to the presumption of negligence was not adapted to the evidence; that there was no evidence to show that the plaintiff was injured by the running of a locomotive or cars or other machinery of the defendant, or by any person in its employment; that the case was not one to which the statutory presumption against railroads was applicable; and that the charge raised a general presumption of negligence against the defendant, whereas, if any presumption arose at all, the court should have limited it to the specifications of negligence submitted to the jury. The evidence furnished ample basis for this charge. The judge excluded from the consideration of the jury all the specifications of negligence except two, causing the light to go out and causing the sudden jerk; and while he did not, in immediate connection with the charge complained of, inform the jury that the presumption of negligence arising against the defendant would be limited to the specifications of negligence submitted to them, the general charge contained in the record shows that he did do this several times. At one point in the charge he instructed the jury: "Your investigation of the case on the question of whether defendants were negligent or not negligent will be confined to these two specifications, and you would not be authorized to go outside and inquire whether the defendant was or was not negligent in some or any other way than that set forth in these two specifications of negligence which will be submitted to you." At another time he said: "Your method of inquiry, confining yourselves to these two spec-

ifications to which I have called your attention," etc. And in several other portions of the charge he emphasized the fact that the consideration of the jury was confined to these specifications. Under the entire charge, the jury could not have understood that the judge referred to a presumption of negligence in respect to other matters which he had expressly excluded from their consideration.

9. It is urged that, if the injury occurred as alleged and proved by the plaintiff, this was not a case in which the statutory presumption of negligence arises. The Civil Code, § 2321, declares: "A railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The argument is, that, inasmuch as the car was standing still when the passengers were directed to leave it and go to another car, the injury was not done by the running of the car, or by any person in the employment and service of the company. This argument would be sound if made in regard to an injury which was entirely disconnected from the running of a car, or which was not produced by some direct act of a person in the employment of the company. And such was the ruling in *Ga. R. Co. v. Nelms*, 83 Ga. 70; *Savannah Ry. Co. v. Flaherty*, 110 Ga. 335. But it would be too narrow and restricted a view to hold that if while passengers are in transit upon a car it was stopped for one or more of them to alight, or to be transferred to another car, and the injury resulted to one of them by reason of turning out the lights in the car, or causing it to jerk while the passenger was alighting, this was not done by the running of the car, or by a person in the service of the company, if such person put out the light or caused the jerk. Such an occurrence would be a part of the actual transit. The running of the car, as used in the section of the code above quoted, is not confined to a mere collision with a person on the track. An unnecessary jerk causing an injury to a passenger while alighting is a part of the running, within the reason and spirit of the statute.

Moreover, if while the passenger is in the act of alighting an employee of the company turns out the lights or causes the car to jerk, and as a result the passenger is injured, this would be damage done by a person in the employment and service of the company, within the meaning of the statute.

10. There were numerous other grounds of the motion for a new trial, alleging errors on the part of the court in stating the contentions of the defendant, and in various charges and refusals to charge, and omissions to charge. A careful consideration of all of them in connection with the evidence and the charge given convinces us that none of them are well taken. The verdict is supported by the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

JOHNSON v. THROWER et al.

- CANDLER, J. 1. As has been repeatedly held, this court will not consider grounds of a motion for a new trial complaining of the admission of evidence, oral or documentary, unless the evidence is set out in the motion, either literally or in substance, or attached thereto as an exhibit. *Petty v. Brunswick R. Co.*, 109 Ga. 666, and cases cited; *Fraser v. State*, 112 Ga. 13; *Freeman v. Mencken*, 115 Ga. 1017.
2. It is not the office of a motion for a new trial to call in question the sufficiency of an amendment to pleadings. *Kelly v. Strouse*, 116 Ga. 874 (6).
3. This court will in no case reverse the judgment of the trial court on account of the refusal of the judge to direct a verdict.
4. Motions to continue are addressed to the sound legal discretion of the trial judge; and in the present case it does not appear that that discretion was abused.
5. The alleged newly discovered evidence on account of which a new trial was asked was not clearly set out in the motion, nor does it appear by affidavits of the movant and her counsel, or either, that the existence of the evidence was not known at the time of the trial and could not have been known by them in the exercise of ordinary diligence. Hence this ground of the motion is without merit.
6. As between the parties to this suit, the title to the land in question was directly involved, both by reason of the averments and cross-prayers of the answer of the defendants, and by reason of the fact that the plaintiff was not entitled to the full relief sought if the ownership of the land was in the defendants. There was ample evidence to support the finding of the jury that the title of one of the defendants was superior to that of the plaintiff; and it was not error, of which the plaintiff can complain, to direct a verdict in her favor on the questions as to the validity of the dispossessory warrant the enforcement of which was asked to be enjoined,

and the validity of the rent contract introduced in evidence, and to submit to the jury the question of the title to the realty in dispute.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

Argued June 23, — Decided August 3, 1905.

Equitable petition. Before Judge Lumpkin. Fulton superior court. October 22, 1904.

Robert L. Rodgers, for plaintiff.

C. L. Pettigrew and J. W. & J. D. Humphries, for defendants.

COOLEY v. MOSS, and *vice versa*.

1. If an owner of land enters into a contract which is legally binding, whereby he agrees to sell a certain described lot to another for a named price, but that he shall not make the deed until he shall have sold a certain other lot or lots, if before selling such other lots he sells and disposes of the lot covered by the contract, and thus puts it beyond his power to make a deed to the other party, this constitutes a breach of the contract, which will authorize an immediate suit against him, without waiting for him to sell the other lots, and without requiring a tender of the purchase-money to him by the other party to the contract.
2. Where one agrees to sell land to another at a given price, and that he will make a deed when he shall have sold certain other lots, and where the other person does not agree to buy or to pay the consideration named, and there are no mutual obligations, and no other consideration appears, the contract is unilateral and does not bind the owner of the land, and he may withdraw from it or repudiate it.
3. Where mutual promises are relied on as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties. If one assumes under such an agreement to do a special act beneficial to another, and that other, under the terms of the contract, is under no obligation to perform any act of advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform.

Argued June 23, — Decided August 3, 1905.

Action for breach of contract. Before Judge Reid. City court of Atlanta. October 22, 1904.

Cooley brought an action against Moss, laying his damages in the sum of \$500, and alleging that on April 28, 1903, the defendant entered into the following agreement with the plaintiff: "This agreement made this day between A. J. Moss and J. L. Cooley. A. J. Moss agrees to sell the said Cooley the N. W. cor-

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123	707
130	268

ner of Glenwood ave. and Broyles street, fronting 40 ft. on Glenwood and back 140 ft. on Broyles st.; the said Moss is to make deed to said Cooley upon his paying \$300 for said lot, but it is understood that said Moss is not to make deed until he has sold the lot adjoining or the two western lots of the block. Whenever he makes sales as above specified, he then will close the trade with said Cooley." Signed by each party. The defendant fails and refuses to comply with this agreement, and has sold the lot described in it, and disposed of it to some other person than the plaintiff, and has put it beyond his power to make a deed to the plaintiff and to comply with the contract. Plaintiff has been ready, able, and willing to take and pay for the land, and is now ready, able, and willing to do so, but has not done so on account of the failure of the defendant. The defendant demurred on the following grounds: First, because the petition sets forth no cause of action; second, because it shows no consideration for the contract alleged to have been entered into between the parties; third, because it does not show that the defendant has sold the lot adjoining, or the two western lots of the block referred to in the agreement, and until the selling of the adjoining lot, or the two western lots, no right of action exists, or can exist in the plaintiff. The court overruled the first and second grounds of the demurrer, but sustained the third ground, and dismissed the action. The plaintiff filed a bill of exceptions, and the defendant a cross-bill.

C. D. Maddox, for plaintiff.

DuBignon & Alston, for defendant.

LUMPKIN, J. (After stating the facts.) 1. The main bill of exceptions makes a single question: If the contract be treated as valid and binding on Moss, does the declaration allege a breach, giving an immediate right of action? It has been said that "A breach of contract may arise in any one of three ways, namely: by renunciation of liability under the contract; by failure to perform the engagement; or by doing something which renders performance impossible." 7 Am. & Eng. Enc. L. (2d ed.) 149-150. If an agreement is made that one shall convey land to another, and if the former conveys it to a third person, and thus puts it out of his power to comply with his contract, the latter may sue him without waiting for the contract time to elapse, and without demanding a conveyance. Bishop on Contracts, § 1430. In

Newcomb v. Brackett, 16 Mass. 161, it was said: "A., for a valuable consideration, promises to convey land to B., as soon as B. should pay to A. a certain sum of money; A. conveys the land to a stranger; and it was held that B. was presently entitled to his action, without payment or tender of the money." In *Heard v. Bowers*, 23 Pick. 455, this doctrine was pursued even to the extent of holding that "Where a party stipulates to convey an estate to another at a future day, and in the meantime conveys it to a third person, he is guilty of a breach of his stipulation; and although he should repurchase the estate before the day named, he could not compel the other party to take the land and perform the contract on his part; but this rule does not apply to the case of an involuntary disability of a party to perform his stipulations, which he may remove previous to the time appointed for their performance." See also *Hopkins v. Young*, 11 Mass. 302; *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264; *Poirier v. Gravel*, 88 Cal. 79; 1 Addison on Contracts (3d Am. ed.), 40; *Shaffner v. Killian*, 7 Ill. App. 620; *Howard v. Daly*, 61 N. Y. 362; *Gray v. Green*, 16 Hun, 334; *Smith v. Ga. Loan Co.*, 113 Ga. 975. One or two of the cases cited, including the last, arose on a renunciation by one party of a continuing contract consisting of mutual stipulations. Voluntarily to place it beyond one's power to comply with a contract constitutes a breach quite like the other breach arising from renunciation. As to what is sometimes called an "anticipatory breach" arising from the renunciation of a contract of the character referred to, and the right to bring an action at once upon the occurrence of such a breach, or to treat the contract as still binding and wait until the time for performance arrives, the authorities have not always been in perfect harmony; but this court has followed the line of authority resting upon the leading case of *Hochster v. De la Tour*, 2 El. & Bl. 678, and *Roehm v. Horst*, 178 U. S. 1. The trial judge erred in sustaining the third ground of the demurrer.

In the brief for defendant in error it is said that the declaration does not set out the time when this sale occurred, nor the time when Cooley took advantage of it, so as to show whether he acted promptly; but no such point was made in the demurrer.

2, 3. The cross-bill of exceptions assigns error in overruling the other two grounds of the demurrer. An examination of the

contract sued on will show that Moss agreed to sell to Cooley a certain lot, and to make him a deed upon his paying \$300, "but it is understood that said Moss is not to make deed until he has sold the lot adjoining or the two western lots of the block. Whenever he makes sales as above specified, he then will close the trade with said Cooley." Cooley made no agreement or promise to do anything, nor was any consideration stated in the contract. Inasmuch as a valuable consideration is one of the essentials of a valid contract, it follows that in an action upon it the burden of proof is upon the plaintiff to show a consideration; and where the instrument sued on is a simple contract, and is not itself sufficient to show a consideration, it is incumbent on the plaintiff to allege and prove that there was one. 6 Am. & Eng. Enc. L. (2d ed.) 763; 4 Enc. Pl. & Pr. 928. Certain instruments import a consideration, and the production of such an instrument alone furnishes prima facie evidence of a consideration, and casts upon the defendant the burden of proving want or failure of it. Such bills and notes as under the law merchant import a consideration would be an illustration of this class of instruments. Sealed instruments import a consideration. At common law the presumption of a consideration for specialties was conclusive. In some of the United States all contracts made in writing and signed by the party to be charged thereby are declared by statute to import a consideration. 6 Am. & Eng. Enc. L. (2d ed.) 762, 763; *Rowland v. Harris*, 56 Ga. 141. Except in instances of this character, however, the rule above announced applies. In *Morrow v. Southern Express Co.*, 101 Ga. 810, it was said: "Where mutual promises are relied upon as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties; and if one assume under such an agreement to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform any act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform." See also *McCaw Manufacturing Co. v. Felder*, 115 Ga. 408; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6; *Huggins v. Southeastern Lime Co.*, 121 Ga. 311; *Swindell v. First National Bank*, 121 Ga. 714; *Swan Oil Co. v. Linder*, 123 Ga. 550; 7 Am. & Eng. Enc. L. (2d ed.)

114. A decision in regard to an option to purchase real estate will be found in *Frank v. Stratford-Handcock Co.* (Wyo.), 67 L. R. A. 571. It is true that the instrument sued on begins with the words, "This agreement made this day between A. J. Moss and J. L. Cooley," and is signed by both parties. But Cooley nowhere agrees or promises to do any act or binds himself in any way. He does not agree to take the lot, or to pay the purchase-price. Suppose that Cooley had announced that he was unwilling to take the lot, there is no promise or agreement on his part contained in the paper on which Moss could have brought an action; nor does any agreement on his part at any time appear. It was in the nature of an agreement between the two by which Cooley was to have an option or right to buy the lot and Moss was to sell it to him at a certain price. Moss agreed that when he had sold certain other lots "he then will close the trade with said Cooley." But there is no agreement that Cooley will then close the trade with Moss. Nor is there any other promise or agreement on Cooley's part which would furnish a consideration for the agreement of Moss. Mutual agreements or promises may furnish a consideration one for the other; but where one party does all the promising and agreeing, the mere fact that the other signs his name to the paper is not sufficient to constitute an agreement on his part. The instrument construed in *Harrison v. Wilson Lumber Co.*, supra, was very similar in these respects to the one now under consideration. It began with the words, "This agreement made in triplicate, and entered into this February 13th, 1902, between Harrison & Garrett, of Forsyth County, Ga., parties of the first part, and the Wilson Lumber Co., Ltd., of Toronto, Ontario, parties of the second part." It then stated that Harrison & Garrett agreed to furnish a sawmill and cut to the order of the Wilson Lumber Company, and to edge and trim in a good workmanlike manner, as called for by the lumber market, such logs to be furnished to the mill desirable to the Wilson Lumber Company, at different places in Dawson and Pickens counties, for which Harrison & Garrett were to receive for such services \$2.50 per thousand feet board measure for all lumber so sawed and accepted by the Wilson Lumber Company. Lumber improperly manufactured should be at the loss of Harrison & Garrett, who were to run out all lumber on trucks at no expense to the Wilson

Lumber Company, when the amount of such cut was 30,000 feet or more; and the contract was to remain in force until such timber "as will have been bought by the parties of the second part is cut, unless mutually agreed upon by both parties hereto." Each of the parties signed this instrument. But it was held to be unilateral.

The fact of bringing this suit for damages can not be considered as an acceptance and agreement on the part of the plaintiff, if for no other reason, because it shows on its face that the defendant had abandoned the contract or violated it and rendered compliance impossible before the declaration was filed. It could not amount to the closing of a contract alleged to have already been rendered impossible of performance by the defendant. This does not conflict with the ruling in *Black v. Maddox*, 104 Ga. 157, or that in *Sivell v. Hogan*, 119 Ga. 167. We are of opinion, therefore, that the trial judge erred in not sustaining the demurrer on the first and second grounds. He correctly dismissed the case, though we can not agree with him as to the reason for so doing. In *Wellmaker v. Wheatley*, 123 Ga. 201, there were mutual promises to furnish a consideration.

Judgment reversed on both bills of exceptions. All the Justices concur, except Simmons, C. J., absent.

LOWE CO. v. CENTRAL OF GEORGIA RAILWAY CO.

Section 4130 of the Civil Code, which provides the mode of proof and defense in a suit in a justice's court upon an open account, does not apply to an action for the loss of or damage to personal property by a common carrier, even though the cause of action is set out in detail in a statement attached to the summons and verified by the affidavit of the plaintiff.

Argued June 24, — Decided August 3, 1905.

Certiorari. Before Judge Lumpkin. Fulton superior court. October 18, 1904.

Moore & Pomeroy, for plaintiff.

J. B. Hutcheson, for defendant.

FISH, P. J. The E. E. Lowe Company brought suit against the Central of Georgia Railway Company, in a justice's court, upon an "account" for the loss of a hay-press and for certain freight over-

charges. A copy of the statement of "account" was attached to the summons and verified by the affidavit of E. E. Lowe. The item in reference to the hay-press was as follows:

"Sept. 23, 1903, 1 hay-press shipped to A. Faber
Freight prepaid, 9/16, 4.70
Sharpes, Fla. 29.70."

Annexed to the statement was the following affidavit:

"Personally appeared before me E. E. Lowe, president of the E. E. Lowe Co., who deposes and says the above account is correct, true, and unpaid. This the 16th day of March, 1904.

"J. A. Stauffacher, N. P., Fulton Co., Ga. E. E. Lowe."

On the day of the trial the plaintiff, without offering evidence, "asked the court for a judgment, and rested the case as made out by the pleadings in said case." The defendant had filed no written defense under oath, and the justice rendered a judgment as requested. The defendant objected to this ruling of the magistrate, for the reason that the affidavit was not sufficient, as it had no jurat and did not recite that it was sworn to before any one and, after the judgment was rendered, carried the case to the superior court by writ of certiorari, still complaining of the insufficiency of the affidavit, and further alleging that section 4130 of the Civil Code, which authorizes a judgment to be taken in a justice's court in a suit upon an open account supported by the written affidavit of the plaintiff without further proof, in the absence of a counter-affidavit by the defendant, does not apply to the present case. The certiorari was sustained and the case sent back to the magistrate for a new trial. To this ruling the plaintiff excepted.

It is not necessary to decide whether or not the affidavit was valid; for, granting that it was, the ruling of the judge of the superior court in sustaining the certiorari was still correct, for the reason that this was not a suit upon an "open account" within the meaning of that term as used in the Civil Code, § 4130. Whether or not a suit for overcharges on freight is a suit upon an "open account" within the meaning of the statute referred to, a claim for the loss of a hay-press certainly is not, it having been held in the case of *Caudell v. Southern Railway Co.*, 119 Ga. 21, that "section 4130 of the Civil Code, which provides the mode of proof and defense in a suit in a justice's court upon an open

account, does not apply to an 'action for damage and loss or destruction of goods' by a common carrier, although an itemized list of the articles and their values is attached to the summons and sworn to as correct." Counsel for plaintiff, however, contend that, granting that the item in reference to the hay-press was not clearly a proper item in a suit upon an open account, yet it "could have been cleared had defendant demanded a bill of particulars," and this it should have done. But in our opinion it was not incumbent upon the defendant to ask for a bill of particulars. The statement attached to the summons was itself in the nature of a bill of particulars, and the item of the hay-press, as above set out, in connection with the caption, "Central of Georgia Railway Co., Account E. E. Lowe Co.," was on its face a claim against the railway company for the loss of or damage to the article and the freight charges which had been paid for its transportation. We therefore hold that the judgment of the superior court in setting aside the judgment and remanding the case for a new trial was not error, the judgment of the magistrate not having been authorized by the evidence.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

123 714
129 408

ATLANTA NEWS PUBLISHING COMPANY v. MEDLOCK,
by next friend (three cases).

1. A writing containing a statement that a person had been "bribed" to testify as a witness against one party and in the interest of his adversary imputes to such person the crime of perjury, and is libelous.
2. The privileged communications recognized in the law of slander and libel as freeing the speaker or writer from liability are of two classes, the one where the privilege is absolute, and the other where the privilege is conditional.
3. "The characteristic feature of absolute, as distinguished from conditional, privilege is that in the former the question of malice is not open; all inquiry into good faith is closed."
4. In every case of conditional privilege, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a right of action.
5. An attorney at law has a conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and

the conduct of the parties in connection therewith as in his judgment seem proper.

6. Ordinarily the publisher of a newspaper has no privilege as to what appears therein, but is liable for the same as any other person.
7. The publisher of a newspaper is, however, authorized to publish a fair and honest report of the proceedings of a judicial trial; and is not liable on account of such publication, in the absence of express malice. And this is true although what appears in such report as a part of the comments of counsel would have been slanderous if uttered under other circumstances by the attorney.
8. Where a publication is made in a newspaper, of the proceedings of a judicial trial, in which appear what purport to be the remarks of counsel, made during the progress of the case, which are slanderous in their nature, and such remarks were not in fact made by the counsel, the publisher is liable in an action of libel to the party aggrieved.
9. There was no error in overruling the general demurrers to the petitions.
10. Those portions of the petitions which were made the subject of special demurrers were allegations which were permissible as matter of inducement or aggravation, or by way of innuendo, and therefore were properly embraced within the pleadings, and were not subject to the objections taken in the demurrers.

Argued June 24,—Decided August 3, 1905.

Actions of libel. Before Judge Reid. City court of Atlanta.
November 18, 1904.

Three Medlocks, aged respectively 13, 14, and 15 years, brought their separate suits for libel against the Atlanta News Publishing Company, a corporation. The petitions in the three cases were substantially the same, and were in substance as follows: The defendant publishes a newspaper known as the Atlanta News, which claims a circulation of nearly 25,000. On August 23, 1902, Mrs. Moxley, an aunt of the plaintiffs, brought suit against the Georgia Railway and Electric Company, seeking to recover damages for two injuries which she claimed to have received while a passenger upon a car of that company, one on June 11, 1902, and the other on July 15. The plaintiffs were present when Mrs. Moxley was hurt on the latter occasion, and were subpoenaed as witnesses by the railway company, and testified in the case, honestly and fairly relating what happened on the occasion in question. After they had testified, and before the case was concluded, on January 22, 1904, the defendant published in its newspaper the following article:

"BRIBERY IS CHARGED TO RAILWAY COMPANY.

"Prominent Attorney in Speech says Witnesses are Bribed.

"A sensational charge of bribery was laid against the Georgia Railway and Electric Company by Colonel W. P. Andrews in the second division of the City Court this morning. The case of Mrs. Louise E. Moxley against the railway company for \$12,000, for alleged personal injuries, was on trial, when Colonel Andrews, Mrs. Moxley's attorney, made several sensational statements in his speech to the jury. Mrs. Moxley claims to have been injured some months ago while in the act of alighting from the car. She claims that it has affected her nervous system greatly, as well as her physical condition. She is unable to walk, and is rolled about in a chair. The Georgia Railway and Electric Company brought three children into court to testify that Mrs. Moxley had suffered all her life from the troubles alleged to have been received from the injury; and Colonel Andrews stated that they had paid these children \$2 each to come into court as witnesses. The Georgia Railway and Electric Company put two dollars into the palms of these little children and dragged them here into court after having Mr. Simmons talk with them for an hour, and knowing full well what they were going to say before they came here, said the attorney. Colonel Andrews stated that the defendant company had gone to see three little children, Carrie Medlock, 13 years old, Mary Medlock, 16 years old, and Wood Medlock, 15 years old, the nieces and nephew of the plaintiff, and bribed them to testify against her and in the interests of the company. Some allusion to this alleged bribery was made in the argument yesterday, and Attorney Ben Conyers for the railway company admitted that they had paid the witnesses two dollars each. Colonel Andrews says: 'When they pay them this money they expect value received, and the value received in this case is bought testimony. They make these little children as corrupt as the fountains of hell.' The attorneys for the railway company did not reply to these charges in the court-room."

It is alleged that the article is a false and malicious defamation in writing, tending to expose the plaintiffs to public hatred, contempt, and ridicule; that the charges and intimations there set forth were made maliciously; that the attorney for Mrs. Moxley was president of the defendant company, was present during the

entire trial, and well knew that no such charges or accusations as set out in said article had been made against the plaintiffs; that the effect of the article was to create the impression upon the minds of the readers that the plaintiffs had been bribed by the railway company to testify falsely, and that they had for a money consideration so testified; that the article in effect charges that the plaintiffs had made a corrupt bargain to testify falsely and had carried the same into effect; that the plaintiffs are the witnesses referred to in the article, and the defendant, by its publication, did declare to the public that its president, the attorney for Mrs. Moxley, had in open court charged that the plaintiffs had given "bought testimony," and that the railway company had made them "as corrupt as the fountains of hell;" that the publication was false and malicious; that no such charges were in fact made by the attorney, and the defendant, through its president, who was such attorney, well knew this fact, and the motive of the article was to defame the plaintiffs and expose them to public hatred, ridicule, and contempt. The defendant filed a demurrer in each case, containing numerous grounds, among others, that the petition does not set forth a cause of action; the words alleged are not libelous per se; if they can be so construed, they show upon their face that some one other than the plaintiffs was libeled; they do not purport to be a statement or declaration of the defendant, but merely of an attorney in argument before the jury in a case in court, and are consequently not libelous; they are nothing more than the comments of counsel in the discharge of his duty as such, and are therefore absolutely privileged, both as to the attorney who made them and the defendant who printed them. The demurrer also contains numerous objections to stated paragraphs of the petition, which are not necessary to be here referred to. The court overruled the demurrers, and the defendant excepted.

Andrews & Skeen and Dorsey, Brewster & Howell, for plaintiff in error. *John L. Hopkins & Sons, Rosser & Brandon, and Walter T. Colquitt*, contra.

COBB, J. Viewed in any light, the writing was libelous. It was none the less a libel upon the plaintiffs because it was a libel upon the railway company. The defendant in effect charged that the railway company had corruptly influenced the plaintiffs to

give false testimony, and that they had yielded to this influence. To the mind of any reader, of even less than average intelligence, the writing contained a charge that the plaintiffs had been guilty of perjury, and perjury of the most vicious character, that is, perjury brought about by the acceptance of money. The writing must be taken in that light in which it would appear to the ordinary reader of a public gazette. It does not contain all of the technical niceties of a common-law indictment; nor does it contain all that would be necessary in an accusation under the modern liberal rules in criminal pleading; but the reading public are not special pleaders, and the impression conveyed to the mind of the average public reader is that which is to be sought for in determining whether a writing is libelous in its nature. There can be no two opinions as to the impression which would be conveyed to the mind of any moderately intelligent reader of any age or sex, who was accustomed to peruse the columns of a daily paper, as to what was the charge against the plaintiffs contained in this writing. They were held up by this article before the public gaze as youths of vicious natures, willing to act in utter disregard of all rules of decency, honesty, and propriety, having actually appeared in court and knowingly testified falsely for a money consideration. But it is said that the words "they make these children as corrupt as the fountains of hell," while senseless, are not libelous. It is claimed, that this language is absolutely meaningless; that no rational meaning or inference can be drawn from it; that there is no such thing as a "fountain of hell," and, if there is, there is nothing upon which to base a conception whether it is corrupt or not; that the popular idea of a hell is a place of fire and brimstone, and there is nothing corrupt in either of these elements. There are those in the present day, who, for reasons satisfactory to themselves, contend that there is no such place as hell; but even this class will admit that, if there is such a place, there is nothing there which is consistent with honesty, decency, or the right conception of things. Both the popular and the theological idea of hell has nothing in it to make any connection with that place either desirable or comfortable from a physical or spiritual point of view. The word 'hell' is a synonym for all that is evil and corrupt in the grossest and basest sense of those terms. But even if these words did not

convey to the ordinary mind that these children had been, by the alleged corrupt influences, made as vicious as imps of hell, the writing bore the meaning above referred to, and denounced them to the public as being guilty of base and corrupt perjury. Taken alone, the words "corrupt as the fountains of hell" may be meaningless, but when read in connection with the entire article, there can be no doubt that it bore the meaning above referred to, and was of such a character as to hold the plaintiffs up to public hatred, contempt, and ridicule.

But it is said that the article was merely a report of a trial containing the comments of counsel during the progress of the case, and that what was contained in the article was a privileged communication, both as to the counsel and the publisher. From motives of public policy the law recognizes certain communications and publications as privileged. The privilege which the law thus accords the speaker or publisher is either absolute, entirely freeing the party from any liability to the person injured by the words or the publication, or conditional, that is, the words shall be spoken in good faith, upon a proper occasion. When the privilege is absolute, the motive of the publication is immaterial. When the privilege is conditional actual malice will bring about liability. As remarked by Mr. Chief Justice Bleckley, in *Wilson v. Sullivan*, 81 Ga. 243, "the characteristic feature of absolute, as distinguished from conditional, privilege is, that in the former the question of malice is not open; all inquiry into good faith is closed." The remarks of a legislator in debate, the words of a judge in the course of a judicial proceeding, the averments in a pleading filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, are instances of absolute privilege. While the code does not in any place use the term "absolute privilege," it is recognized as a part of the law of this State in section 3842, which deals with the subject of pleadings, and was expressly held to be the law in the case above cited. The privileged communications enumerated in section 3840 are those where the privilege is conditional. Among such are found comments of counsel fairly made on the circumstances of the case and the conduct of parties in connection therewith. When in an action for slander it appears that the words spoken were a part of the comments of counsel and were pertinent and material

justified and

to the case under investigation, no matter how false the assertions were, a recovery for slander can not be upheld, unless it be shown that in making the remarks counsel was animated by express malice. As was said by Mr. Chief Justice Warner, in *Lester v. Thurmond*, 51 Ga. 118, 119, "The clear distinction which the law recognizes between words spoken by an attorney at law, in addressing a jury in the regular course of judicial proceedings, and the same actionable words spoken in private conversation, not privileged communications, is this: No action can be maintained against an attorney at law for words spoken to a jury, as in this case, without proof of *actual malice*, and it is incumbent upon the plaintiff to furnish such proof; whereas, when actionable words are spoken in private conversation, the law implies that the words were spoken maliciously, and it is not incumbent on the plaintiff to prove malice. The attorney at law is protected by his privilege, on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. If, however, an attorney at law avails himself of his position as an advocate *maliciously* to slander another by uttering words wholly unjustifiable, then he would be liable to an action, but not otherwise."

A lawful occasion can not be used by any one to whom the law accords a conditional privilege, for the purpose of venting his malice; and if he do so, he is bound to prove that his assertions are true. *Taylor v. State*, 4 Ga. 24. If the words complained of in the present case had been uttered by the attorney in open court, during the progress of a trial in which he was representing his client, he would not be liable in damages to those about whom the words were spoken, unless the words were spoken as a consequence of express malice on his part. But it does not follow, because an attorney will be exempt from liability for words spoken in open court in the conduct of his case, that he would be likewise exempt when repeating the words on another occasion when he was under no obligation either to the public or his client to speak in reference to the matter. While no malice would be implied, either from the character of the words or the falsity of the charge, when they were uttered in the course of a judicial proceeding, the repetition of the words, either in private conversation or in a published article in a newspaper at his instance,

when no public or private duty required him to repeat them,¹ would place him, as to such repetition, upon the same footing as any one who speaks of another, and he speaks then at his peril if the words are not true. See, in this connection, Townshend on Slander and Libel (4th ed.), § 218, p. 327.

Among the communications enumerated as belonging to the class of conditional privilege are also found fair and honest reports of proceedings of legislative or judicial bodies. If a newspaper publishes a fair and an honest report of a trial, stating what was the character of the controversy and embracing the comments of counsel actually made during the progress of the trial, there could be no recovery for such publication, unless it was made to appear that the publisher was animated by express malice; and this would be true notwithstanding there were contained in the publication, as a part of the comments of counsel, words which if uttered elsewhere would have rendered the speaker and the publisher liable in damages. Ordinarily the publisher of a newspaper is not privileged in the publications therein made, but is liable on account thereof in the same manner as other persons; and defamatory matter does not become privileged simply for the reason that it is published in the form of an advertisement, or as news, or is furnished by a correspondent, or is copied from other publications. *Cox v. Strickland*, 101 Ga. 493 (3). On the subject of privileged communications generally, see Newell on Slander and Libel (2d ed.), 388 et seq.; Townshend on Slander & Libel (4th ed.), 295 et seq.; Odgers on Libel & Slander (text-book series), t. p. 140 et seq. In an action for libel, that a writing constituted a privileged communication is generally a matter for plea. *Holmes v. Clisby*, 118 Ga. 820 (2); *Flanders v. Daley*, 120 Ga. 885 (4). But if it appears upon the face of the petition that the communication was really privileged, there seems to be no good reason why this might not be taken advantage of by demurrer. The petition in the present case distinctly alleges that the words complained of were not uttered by the attorney during the trial of the case which was reported, and therefore they were no part of any comments of counsel during the progress of a judicial trial. Hence the publication was not privileged as a fair and an honest report of the proceedings of a court. The publication of the article was a

*None of
any of them*
voluntary, gratuitous, and libelous statement by the defendant, purporting to have been made upon a judicial trial, when such was in fact not true. It was also distinctly alleged that the falsity of the statement must have been known to the defendant, for the attorney whose alleged remarks were reported was the president of the company. There was no error in overruling the general demurrer to the petition. Those portions of the petition which were made the subject of special demurrer were allegations which were permissible as matter of inducement or of aggravation or by way of innuendo, and therefore were properly embraced within the pleading. The petitions were not subject to any of the criticisms raised in the special demurrers.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

HAWKINS v. FIDELITY & CASUALTY COMPANY OF NEW YORK.

LUMPKIN, J. "A foreign corporation doing business in this State and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations, upon any transitory cause of action whether originating in this State or otherwise; and it is immaterial whether the plaintiff be a non-resident or a resident of this State, provided the enforcement of the cause of action would not be contrary to the laws and policy of this State." *Reeves v. Southern Railway Co.*, 121 Ga. 561.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

Argued June 24, — Decided August 3, 1905.

Action on accident-insurance policy. Before Judge Reid. City court of Atlanta. November 12, 1904.

Hawkins brought suit, in the city court of Atlanta, against the Fidelity and Casualty Company of New York. He alleged that the defendant was a corporation of the State of New York, engaged in the business of accident insurance, and that it had an agency and office for the transaction of business, and an agent in charge of the same in Fulton county, Georgia, over which the jurisdiction of the city court of Atlanta extends. A demurrer was filed on the grounds, that the defendant was a non-resident corporation; that the action was based on a policy of accident insurance issued by the company on the life of James W. Hawkins, the son of the plaintiff, and payable to the latter; that the contract was issued outside of the State of Georgia, and the insured

died in Oklahoma territory; and that, these facts appearing on the face of the declaration, the court was without jurisdiction. The demurrer was sustained and the action dismissed. The plaintiff excepted.

F. M. Johnson and W. R. Hammond, for plaintiff.

Slaton & Phillips, for defendant.

PITTSBURGH PLATE GLASS CO v. PETERS LAND CO.

One who furnishes material for the improvement of real estate, upon the employment of a contractor whose contract for the improvement is with a lessee, and who sustains no contractual relation with the owner of the fee, is not entitled to a lien as against such owner under the provisions of the Civil Code, § 2801, par. 2, as amended by the act of 1899 (Acts 1899, p. 33, Van Epps' Code Supp. § 6176).

Argued June 26, — Decided August 3, 1905.

Foreclosure of lien. Before Judge Lumpkin. Fulton superior court. November 22, 1904.

The Pittsburgh Plate Glass Company, a corporation, brought suit against the Peters Land Company, a corporation, the Gale Manufacturing Company, a partnership, DeSaussure, trustee in bankruptcy of the partnership, and Daniel Brothers, a partnership. The petition alleged, that the plaintiff was a materialman and as such supplied to the Gale Manufacturing Company glass of a stated value, which was used by that company in improving the premises of the Peters Land Company, consisting of a described lot and building in the city of Atlanta. Daniel Brothers were lessees of the Peters Land Company, holding under a three-year lease, and at the time of its execution neither the glass nor window inclosures for which the material was supplied by the manufacturing company were in the rented premises. The lease was for a portion of the building above referred to, and contained a provision that Daniel Brothers should have the privilege, at the expiration of their lease, of removing fixtures and show-window inclosures which they had at their own expense placed in the premises during the term. It was averred that the building was incomplete at the time the glass was furnished, and that the plaintiff was not aware of any agreement that the glass should be considered and treated as personalty, but understood that it was

123	723
124	809
123	723
125	230
125	340
126	616

to form a part of the building. The work was done and the glass and window inclosures put in place with the actual knowledge of the Peters Land Company and by its consent, in accordance with and evidenced by the stipulation in the lease above referred to. The Gale Manufacturing Company was adjudged a bankrupt, and DeSaussure was appointed trustee. The plaintiff filed a claim of lien against the Peters Land Company, claiming a lien upon the land, and also against Daniel Brothers, claiming a lien upon their leasehold interest. The prayer of the petition was for a judgment against the Gale Manufacturing Company, and for a foreclosure of its lien against the Peters Land Company and Daniel Brothers. Attached to the petition were copies of the account against the Gale Manufacturing Company and the claims of lien above referred to. To this petition the Peters Land Company and Daniel Brothers filed demurrers both general and special. The court dismissed the petition as to the Peters Land Company, and overruled the demurrer of Daniel Brothers. The plaintiff excepted, but Daniel Brothers acquiesced in the ruling against them.

Slaton & Phillips, for plaintiff. *John L. Hopkins & Sons*, *C. D. Maddox*, and *W. D. Ellis Jr.*, for defendants.

COBB, J. The plaintiff had no contractual relation with the Peters Land Company. Neither had it any contractual relation with Daniel Brothers, the tenants of the Peters Land Company. Its contractual relation was solely with the Gale Manufacturing Company, which sustained an independent contractual relation with Daniel Brothers. The question, therefore, is whether, under the law of this State, under such a condition of affairs, the plaintiff can assert a lien against the Peters Land Company, an entire stranger to it in every way. The provision of law under which this right to a lien is claimed is found in the Civil Code, § 2801, par. 2, as amended by the act of 1899. As amended that paragraph reads: "When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, then, and in that case the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or material furnished, unless such true owner shows that such lien has been waived in writing, or

produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Acts 1899, p. 33, Van Epps' Code Supp. § 6176. Under this law a materialman who furnishes material to one who has a contract for the improvement of real estate with the true owner of the same unquestionably has a lien, the law declaring that this lien shall arise in favor of such a person when the material is furnished upon the employment of a contractor. There is no question that the lien arises when the material is furnished upon the employment of a contractor, and it is also declared that it shall arise when furnished upon the employment of "some other person than the owner." The right of the plaintiff to a lien against the Peters Land Company depends, therefore, upon whether it is embraced within that class which is described by the words just quoted. There was at one time a law in this State that mechanics had a lien upon property improved by them, "without regard to the title." Code of 1863, § 1971; Code of 1868, § 1959. But this law was repealed by the lien law of 1873. *National Bank v. Danforth*, 80 Ga. 68 (5). The words, "some other person than the owner," following the word "contractor," seem to have first made their appearance in the law of this State in the lien act of 1873. If these words can properly be construed to mean any person furnishing, under any circumstances, material for the improvement of real estate, then the plaintiff might have a lien, provided the material furnished under the circumstances shown in the petition could properly be considered as an improvement of real estate. But if the plaintiff is entitled to a lien, then any person who should happen to furnish material for the improvement of real estate would be so entitled, without reference to whether he had any relation, contractual or otherwise, with the true owner, or with any one having any interest in the property. This certainly could not have been intended by the General Assembly. But of course the words must be given some meaning, and the question therefore is, what do they mean? They follow the word "contractor," being connected with that word by the disjunctive "or," and under the well-settled rule of construction the persons

embraed within the meaning of the words will be persons occupying a similar relation to the owner as that of a contractor.

Thus interpreting the statute, it would mean that a materialman who furnished material for the improvement of real estate to one who occupied the legal relation of a contractor, or one who had some contractual relation with the true owner in connection with the improvements to be made, would have a lien, and that no one else would. The word *contractor* is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate, and the other persons referred to in the statute embrace that class who may furnish material for the improvement of real estate but may not be engaged in a business commonly known as the business of a contractor. Before a lien can arise against the owner of the property, there must be some link of a contractual nature which will connect the furnisher of the material, directly or indirectly, with the owner, and it could never have been contemplated that an entire stranger to the owner and an entire stranger to every one with whom the owner had dealt in reference to the property should, by the mere furnishing of material to be used in improving the owner's property, be entitled to a lien. Giving to the words above quoted the meaning we have given to them will not render them entirely useless and meaningless in the statute, and at the same time such a construction will prevent the statute from operating harshly upon all owners of real estate; the question whether real estate shall be improved being left, under any other construction, to the discretion of entire strangers to the true owner, and not to those with whom the owner has dealt in relation to the matter of the improvement. Whether the glass furnished to the tenants of the store, subject to be removed, and capable of being removed without injury to the freehold, at the expiration of the tenancy, would be under any circumstances an improvement of real estate as against the true owner, we will not now undertake to decide. The plaintiff did not stand in any relation, directly or indirectly, to the owner, which would authorize a claim of lien against it under the existing laws of this State. There was no error in sustaining the general demurrer of the Peters Land Company.

There being no exception by Daniel Brothers to the judgment overruling their demurrer, we are not called upon to determine whether a lessee for a term less than five years is an owner of real estate within the meaning of the lien laws.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

BATES v. BIGBY.

123 727
el25 379

1. A delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been accomplished the property shall be returned to the person who delivered it, constitutes a bailment. A justice's court has jurisdiction of an action on the breach of such contract, when the amount sued for does not exceed one hundred dollars.
2. A notary public and ex-officio justice of the peace, although his resignation is tendered to and accepted by the Governor, continues in office, under the statute of this State, until his successor is appointed and qualified.
3. The certiorari was properly sustained; and there was no error in the direction, given by the judge of the superior court, that an irregularity in the entry of the case on the justice's docket be corrected in accordance with the facts.

Argued June 26, — Decided August 3, 1905.

Certiorari. Before Judge Lumpkin. Fulton superior court. December 13, 1904.

C. B. Reynolds, for plaintiff in error. *H. W. Dent*, contra.

FISH, P. J. J. G. Bates filed an affidavit of illegality to an execution issued by Ormond, N. P. and ex-officio J. P. of the 1234th district, G. M., Fulton county, in favor of Mrs. E. K. Bigby against "Southern Dye and Cleaning Works, J. G. Bates, pro., George B. Beck, security," claiming that the execution issued against him and was proceeding illegally. Plaintiff moved to strike the illegality, upon various grounds, which motion was overruled by the magistrate and the illegality sustained. Upon certiorari, this ruling was reversed, and the case remanded with direction. Bates sued out a writ of error, which brings in review the judgment rendered in the superior court. One ground of the illegality was that "The account sued upon in the case in which said fi. fa. was issued was in substance as follows: Southern Dye and Cleaning Works (J. George Bates, Pro.), to Mrs. E. K. Bigby, to value of one pair double blankets, turned over to the Southern

Dye and Cleaning Works to be cleaned, July, 1902, and which have not been returned, \$20.00, below which follows an affidavit by the plaintiff in addition that demand has been made. Affiant claims that the same sets forth no cause of action of which a justice's court has jurisdiction, the action sounding in tort and not being for an injury or damage to said personal property. This being true, affiant claims that the suit being void, the fi. fa. issued thereon is likewise void."

If the court did not have jurisdiction of the subject-matter of the suit, the judgment was void, and illegality would lie to the execution issued thereon. *Planters Bank v. Berry*, 91 Ga. 264. The constitution of this State provides that "Justices of the peace shall have jurisdiction in all civil cases arising ex contractu, and in cases of injuries or damages to personal property, when the principal sum does not exceed one hundred dollars." Civil Code, § 5856. Clearly the action was not for injuries or damages to personal property. Did the cause of action arise ex contractu? From the affidavit of illegality it appears that the suit purported to be on account for twenty dollars, the value of one pair of double blankets turned over to the defendant to be cleaned, and which were not returned although demand for the same had been made. Technical rules of pleading are not required in justice's courts, and a fair construction of the whole statement in reference to the account, especially after judgment, is, that the plaintiff delivered to the defendant a pair of double blankets to be cleaned by him, which, after being cleaned, were to be redelivered by defendant to plaintiff; that defendant had failed, after demand, to redeliver them; and that they were of the value of twenty dollars, for which amount plaintiff sued. A delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been fulfilled the property shall be redelivered to the person who delivered it, constitutes a bailment. 5 Cyc. 161. Therefore, after the blankets had been cleaned, it was the duty of the defendant, in accordance with his contract, implied at least, to return them to the plaintiff, and for his failure or refusal so to do, without legal excuse, a right of action accrued to the plaintiff. When a tort has been committed with respect to the subject-matter of the bailment, the bailor may either sue for the tort or waive the tort and sue in assumpsit for a breach of

the contract of bailment. 5 Cyc. 214. In *Rockwell v. Proctor*, 39 Ga. 105, the suit was against an innkeeper for the value of a lost overcoat deposited with him by a guest. It was held that the justice's court had jurisdiction of the subject-matter of the action, as it was for the breach of the implied contract of the innkeeper "to secure his guest's goods in his inn." When the transaction partakes both of the nature of a tort and a contract, the party injured may waive the one and rely solely on the other. Civil Code, § 3811. All the authorities agree that where personal property is tortiously taken and converted into money, the owner may waive the tort and sue the wrong-doer in assumpsit. They differ, however, as to the right of the owner to sue in assumpsit where the wrong-doer has not sold or otherwise disposed of the property, but retains it for his own use. This court has held that where one wrongfully takes the personalty of another and converts it to his own use in some manner other than by a sale and receipt of money therefor, the owner is restricted to his right of action ex delicto—he can not waive the tort and sue ex contractu. *Cragg v. Arendale*, 113 Ga. 181, and cit. Where, however, a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of a breach of the bailee's duty imposed by his relation may be waived by the bailor and assumpsit maintained, the reason being that the relation of the parties, out of which the duty violated grew, had its inception in contract. 4 Cyc. 331, 332; *Zell v. Dunkel*, 160 Pa. St. 353; *Zindall v. McCarthy*, 44 S. C. 487. As the cause of action declared on in the suit wherein the judgment was rendered upon which the execution issued was the breach of the defendant's duty to return the blankets to the plaintiff in accordance with his implied contract, such cause of action arose ex contractu, and the justice's court had jurisdiction thereof.

2. Another ground of illegality was, that the judgment upon which the execution issued was based upon a verdict rendered on an appeal to a jury in the justice's court from a judgment rendered, on August 25, 1903, by W. L. Venable, who had, on August, 22, 1903, "in writing and unconditionally," resigned the office of notary public and ex-officio justice of the peace of the militia district in the justice's court of which the case was

then pending, and the Governor on the same date "accepted said resignation unconditionally," and for this reason Venable, at the time he rendered such original judgment, was neither de jure nor de facto a magistrate, and that therefore the appeal from his judgment, the verdict on the appeal, and the judgment "rendered by the present justice" on the verdict were all void. "Public officers are trustees and servants of the people" (Constitution, Civil Code, § 5698), and "All officers of this State must . . . discharge the duties of their office until their successors are commissioned and qualified" (Political Code, § 226). This statute is mandatory, and there are good reasons why it should be so, among them, that governmental functions should not cease, and that the public records of the office should be preserved and handed over to a successor. In *Badger v. United States*, 93 U. S. 599, the Supreme Court of the United States had under consideration a section of the constitution of the State of Illinois, which provided that public officers "shall hold their offices until their successors shall be qualified," and the court held that "A supervisor, town clerk, or justice of the peace, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties and responsibilities as a member of the board of auditors, under the township organization laws of the State of Illinois, until his successor is appointed, or chosen, and qualified." The principle ruled in that case has been followed in *United States v. Justices*, 10 Fed. 460, *People v. Supervisors*, 100 Ill. 332, *Jones v. Jefferson*, 66 Tex. 566, and *Keen v. Featherstone* (Tex.), 69 S. W. 983. So notwithstanding the resignation of Venable and its acceptance, it not appearing that a successor had been appointed and qualified, we hold that he was legally a notary public and ex-officio justice of the peace at the time he rendered the judgment in question.

3. Other grounds of illegality were, that no judgment had ever been entered on the docket in the justice's court against the defendant in *fi. fa.*; and if one had been entered, the execution did not follow it. The basis of these grounds is, that the case was entered upon such docket as follows: "*Elizabeth K. Bigby v. Sou. Dye and Cleaning Co., Geo. B. Beck, Prop.*;" that the original judgment appealed from, as well as the judgment entered on the verdict rendered on the appeal, was entered on the docket as be-

ing in favor of the plaintiff against the defendant for a given sum, without stating who the defendant was, and that the execution was issued against "Southern Dye and Cleaning Works, J. G. Bates, Pro., George B. Beck, security." As we have seen, the account sued on was against "Southern Dye and Cleaning Works, (J. George Bates, Pro.)," and it is fair to presume that the same phraseology was used in the summons to designate who was being sued. The entry of the case on the docket differently from the way it appeared in the summons was a mere irregularity; and even if Bates could now be heard to complain of it for any reason, after having appealed from the original judgment in the case and thereby secured another trial, and not having objected at any time pending the suit to such irregularity (see *Reynolds v. Neal*, 91 Ga. 609), he has no meritorious complaint of the direction given by the judge of the superior court in this respect, that is, that the entry on the docket be amended so as to conform to the facts.

We have dealt with all of the assignments of error referred to in the brief of counsel for the plaintiff in error, and our conclusion is that the certiorari was properly sustained.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

ARNOLD v. FARMERS EXCHANGE.

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e124	804

In a proceeding to foreclose a materialman's lien for material furnished a contractor in the improvement of real estate, it is not necessary to allege that the contractor had completed his contract with the owner of the premises, or that such owner had not paid the contractor for the improvements made, upon his sworn statement that he had paid for the materials used. This remedy is statutory, and in its enforcement all the plaintiff need allege is compliance with the statute and that he comes under its protection.

Argued June 27, — Decided August 3, 1905.

Foreclosure of lien. Before Judge Reid. City court of Atlanta. February 3, 1905.

The Farmers Exchange brought an action against Mrs. M. W. Arnold and B. A. Harris, alleging that Harris was a contractor and had made certain improvements on real estate belonging to

Mrs. Arnold; that the plaintiff was a materialman and furnished materials which were used by the contractor in the improvement of the property of Mrs. Arnold; that, within three months from the furnishing of the materials so used, the plaintiff recorded its lien as provided by law; that the contract price for the improvements made by the contractor was in excess of the amount for which the lien was asserted; and that the plaintiff had complied with its contract as to furnishing the materials ordered and used by the contractor in making the improvements upon the property. Suit was commenced within twelve months after the furnishing of these materials. The premises upon which the improvements were made were fully described in the petition; and the plaintiff prayed that its lien be enforced against the property of Mrs. Arnold, and that a general judgment against Harris should be rendered in its favor. Mrs. Arnold demurred to the petition, on the ground that no cause of action was therein set forth, in that the plaintiff did not allege that the contractor had completed and complied with his contract, nor that the owner of the premises had not paid him the contract price of the improvements made upon his sworn statement that he had paid for the materials used the agreed price therefor or an amount equal to the reasonable value of the same. The demurrer was overruled, and Mrs. Arnold excepted.

J. F. Golightly, for plaintiff in error.

Walter McElreath, contra.

EVANS, J. (After stating the facts.) This is a proceeding by a materialman to enforce a statutory lien for materials furnished to and used by a contractor in the improvement of certain real estate belonging to Mrs. Arnold. A materialman who furnishes material for the building, repairing, or improving of real estate is entitled to a lien thereon, as against the owner, when the material is furnished to and used by a contractor in making improvements on the premises, unless the owner shall show that the lien has been waived in writing, or produces the sworn statement of the contractor that the agreed price or reasonable value of the material so furnished has been paid, "provided that in no event shall the aggregate amount of liens set up . . . exceed the contract price of the improvements made." Civil Code, § 2801; Acts of 1899, p. 33, Van Epps' Code Supp. § 6176. The claim of lien must be

recorded in the office of the clerk of the superior court of the county wherein the property is situated, within three months after the material is furnished. Civil Code, § 2804 (2). The materialman's lien must be enforced by an action brought within twelve months from the time his demand against the contractor becomes due. Ibid. § 2804 (3). And the materialman must allege a substantial compliance with his contract in furnishing the material; that he has duly recorded his claim of lien; and that the contract price or reasonable value of the materials furnished the contractor and for which he asserts a lien comes, in whole or in part, within the contract price agreed on between the contractor and the owner of the property improved. *Stevens v. Ga. Land Co.*, 122 Ga. 317. The materialman derives his lien from the statute, and in its enforcement he is not required to allege anything more than that his claim comes within the provisions of the statute, and that he has complied with its terms in asserting his lien. The petition filed in the present case contained all the necessary averments. It was not essential that the plaintiff should negative the defenses which the statute permits to be interposed by the owner of the premises improved. The act of 1899 puts the burden on the owner to show that the lien has been waived in writing, or that the contractor produced a sworn statement that the agreed price or reasonable value of the materials furnished him had been paid.

One of the points raised by the demurrer is that the plaintiff's petition did not affirmatively allege a completion of the contract by the contractor. The statute does not require this to be alleged, and in the prosecution of his statutory remedy it is not incumbent on the materialman to allege anything more than the statute declares shall constitute a prima facie right to assert and enforce his claim of lien. It may be that the owner of the premises can urge, as a defense, not only that the lien has been waived in writing or that the contractor was settled with upon a sworn statement that all materials and labor had been paid for, but that nothing is due to the contractor under the contract because it was voluntarily abandoned by him before its completion. *Rowell v. Harris*, 121 Ga. 239. We are content to rest our decision in this case upon the principle that, in the prosecution of a statutory remedy, all the plaintiff need allege is enough to show that he has complied with all of its essential requirements and has at least a

prima facie right to avail himself of that remedy. The demurrer was, in our opinion, rightly overruled.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

ATWOOD v. HIRSCH.

Civil Code, § 5381, which requires a writ of scire facias to "be served by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," contemplates personal service. Service by leaving a copy at the most notorious place of abode of the defendant is not sufficient.

Argued June 28, — Decided August 3, 1905.

Revival of judgment. Before Judge Roan. DeKalb superior court. October 15, 1904.

Spencer R. Atkinson and W. L. Gignilliat, for plaintiff in error. *Candler & Thomson and Thomson & Hirsch*, contra.

FISH, P. J. Hirsch Brothers sued out a scire facias to revive a dormant judgment. It was served upon the defendant by "leaving a copy at his most notorious place of abode." After return of service had been made, and at the first term of the court, the defendant appeared and moved the court to dismiss the scire facias, upon the ground that it had not been served upon him personally. The judge overruled the motion, and the defendant excepted.

The Civil Code, § 5381, provides that a scire facias to revive a dormant judgment "shall be served by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," etc. No particular method of service is prescribed. "The general rule in regard to service of process or legal notice is that it must be served personally on the party or the individual in question, unless some other mode is especially provided for that purpose by statute or has been otherwise established by long and recognized practice to the contrary." 19 Enc. Pl. & Pr. 614, 620. This rule was cited approvingly in *Baldwin v. Baldwin*, 116 Ga. 472, where Chief Justice Simmons, said: "The code provides for *notice to the defendant* [in a proceeding for alimony], and the defendant himself must be served personally with notice before the court can acquire jurisdiction to proceed

with the case. If the legislature desires to make some other method of service sufficient, substituted service may be provided for by statute, as has been done in ordinary suits. In the absence of such a statutory provision, service by leaving a copy of the petition at the defendant's most notorious place of abode is not sufficient. Indeed it amounts to no service at all." Section 2743 of the Civil Code, which provides the method of foreclosure of mortgages on realty, declares that "the court shall grant a rule directing the principal, interest, and cost to be paid into court on or before the first day of the next term . . . ; which rule shall be published once a month for four months, or served on the mortgagor, or his special attorney, at least three months previous to the time at which the money is directed to be paid into court." In the case of *Hobby v. Bunch*, 83 Ga. 1, the court construes the meaning of the word "served," as employed in the section of the code last quoted, to be personal service, and not service by leaving a copy at the residence of the defendant. In that case Chief Justice Bleckley said, "But the only service which the sheriff could legally make, and the only service effected less than four months before the term of court at which the judgment of foreclosure was rendered which could be valid, would be personal service. Service by leaving a copy at the defendant's residence is unauthorized and insufficient. . . . Were the sheriff to leave it at his own residence and return that he had done so and thereby served the defendant, the service would be quite as good as that which was returned in this instance." Citing *Dykes v. McClung*, 74 Ga. 382, and *Meeks v. Johnson*, 75 Ga. 630.

Section 5382 of the Civil Code, which provides the method of service by publication upon non-residents against whom dormant judgments are sought to be revived, concludes with this language: "which service shall be as effectual in all cases as if the defendant or person to be notified had been personally served." This would seem to indicate that the legislative interpretation of the act providing for service within the State was that such service should be personal. But it is contended by the defendant in error that a writ of scire facias is in the nature of an action at law, that it "assumes all the forms and attributes" of such, and therefore comes under the provisions of the Civil Code, § 4985, which prescribes the mode of service in this State in actions commenced

by petition; it being permissible, under that section, to perfect service by leaving "a copy at the defendant's residence." In answer to this contention we cite Civil Code, §5380: "Scire facias to revive a judgment is not an original action, but the continuation of the suit in which the judgment was obtained." And to combat the argument that since scire facias is but the continuation of the suit in which the judgment was obtained, and personal service not being required in the original action, it should not be required there, we say that neither is twenty days notice necessary in order to bring the defendant into court in the original action, yet by the plain letter of the law it is in scire facias indispensable. The refusal to dismiss the scire facias was error.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

ATLANTA AND WEST POINT RAILROAD COMPANY *v.*
REDWINE *et al.*, commissioners.

1. In an application for a new public road, a landowner whose land is sought to be taken may, in response to the notice served on him as provided in the Political Code, § 521, urge before the ordinary (or county commissioners, as the case may be) any legal objection to establishing the public road, and the judgment of the ordinary (or commissioners) is reviewable by certiorari.
2. As the landowner's remedy at law was ample, it was not erroneous to refuse to enjoin the county commissioners from continuing a proceeding to establish a public road pursuant to the Political Code, §§ 520-522, in advance of the hearing provided for in § 521.

Argued June 28, — Decided August 3, 1905.

Petition for injunction. Before Judge Roan. Campbell superior court. January 28, 1905.

The Atlanta and West Point Railroad Company filed a petition for injunction against the Commissioners of Roads and Revenues of Campbell County, alleging that they were proceeding illegally to establish a public road over and longitudinally upon a portion of its right of way, which had been already devoted to a public use, and was necessary to the operation of its business as common carrier. The petition was met by both a demurrer and an answer, which were considered by the presiding judge upon the interlocutory hearing in connection with certain evidence submitted by the parties. The court declined to grant an injunction, and the railway company excepted.

Dorsey, Brewster & Howell and *C. S. Reid*, for plaintiff.
J. H. Longino, for defendants.

EVANS, J. (After stating the facts.) The commissioners are proceeding, under the Political Code, §§ 520-522, to lay out and open a public road. The different steps pointed out by the statute are: (1) the appointment, by the county commissioners, of three road commissioners to pass upon the public utility of the new road and to mark out its boundaries; (2) the road commissioners must go upon the land, and, if they find the road to be of public utility, must proceed to mark it out and make their report, under oath, to the county commissioners that the road has been laid out conformably to law; (3) when this report is filed with the county commissioners, they determine *ex parte* whether or not they are "willing to grant such road;" (4) if so, then it is their duty to publish a citation for thirty days at the door of the court-house and in a public gazette (if there is one in the county), giving a particular description of the proposed new road and notifying all persons concerned that on and after a certain day therein named the road "will be finally granted, if no good cause is shown to the contrary;" (5) at the same time, the county commissioners shall issue a notice in writing to all persons, their overseers or agents, residing on the land which such road goes through, that they may put in their claims for damages, "or be forever estopped," which notice may be served personally or by leaving it at their most notorious place of abode; (6) upon the day specified in the order to show cause, the county commissioners shall sit as a court for the purpose of determining whether sufficient cause is shown why the road should not be established; and, as cause why it should not be, any party at interest may show that the law with respect to the laying out of the road has not been complied with, or any other legal reason why the commissioners are without power to establish the road as marked out by the reviewers. *Nichols v. Sutton*, 22 Ga. 369. The superior court can properly interfere with the proceedings only when the county commissioners seek to violate the law; so long as they keep within their legal power, the exercise of their discretion ought not be controlled. *Ponder v. Shannon*, 54 Ga. 187.

That the county commissioners, when they sit for the purpose of finally determining whether or not they will grant the pro-

posed new road, sit as a court, has been recognized in several of the cases reported in our books. In some of them the point was not directly raised, and it was assumed that the county authorities were exercising judicial functions, not merely performing ministerial duties. Thus, in *Hightower v. Jones*, 85 Ga. 697, a dissatisfied landowner complained of the decision of the county authorities, by presenting a petition for certiorari to the superior court; the superior court overruled the certiorari, and its judgment was affirmed by this court. In *Ponder v. Shannon*, supra, the issue was raised by objections filed with the county commissioners; testimony was introduced before them, and their judgment was in favor of altering the road in accordance with the report of the reviewers; whereupon a writ of certiorari was sued out by the objectors. The sections of the code above cited were codified from the act of 1818. At that time the county affairs were administered by the justices of the inferior court. Upon the abolition of that court, the duties appertaining to county matters theretofore exercised by the justices were imposed upon the ordinary, save in those counties where the county affairs were administered by commissioners. In the case of *Nichols v. Sutton*, supra, it was expressly held that the justices of the inferior court had authority to alter or lay out public roads, and, in a proceeding to establish a road which had ceased to be a public highway, the remedy of a landowner who was dissatisfied with the decision of the justices of that court was to sue out a writ of certiorari to the superior court, and not a bill in equity to restrain an alleged trespass upon his property. Judge McDonald, who delivered the opinion of the court in that case, remarked (page 372): "We can not sanction the principle that every controversy respecting roads is to be converted into a case for a court of chancery." Since that decision, the practice, so far as we are informed by the reported cases, has uniformly been to complain by a petition for certiorari of any errors committed by the ordinary or county commissioners in laying out a new road or in altering one already established. Such was the course pursued in *Frith v. Justices*, 30 Ga. 723. The plaintiff in error, upon receiving the notice that the reviewers had marked out a road over its right of way, should have appeared before the county commissioners in response to the notice, and urged before them the objections made in its petition for in-

junction. Had the commissioners differed with the company as to the law respecting their power to lay out a public road longitudinally upon its right of way, the company could avail itself of its remedy by certiorari to review their finding. Its remedy at law being adequate, there was no error in refusing the injunction for which it prayed. The court below, in a written opinion assigning the reasons why the injunction was not granted, stated that the merits of the company's complaint were not passed on, and that the relief it prayed was denied upon the ground that it had not pursued the appropriate remedy.

Judgment affirmed. All the Justices concur, except Symmons, C. J., absent.

HENDERSON v. THE STATE.

1. Where an assignment of error depends on a recital of facts, and it appears from a note of the presiding judge and also from another part of the bill of exceptions that such recital is substantially incorrect, such assignment will be disregarded.
 2. In any case where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision, or charge of the court, he is not bound to make a motion for a new trial or file a brief of the evidence, but may present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of. But this rule does not authorize the segregation and bringing to this court, by direct bill of exceptions, of every alleged error committed in the course of a trial. It only authorizes this to be done by such direct and brief form of bill of exceptions in cases where the judgment, decree, or verdict has necessarily been controlled by such rulings, orders, decisions, or charges; and this must be made to appear. Except in such instances, the case should be brought up in the usual form, in order that this court may view the rulings complained of in the light of their context and surroundings.
- COBB, J., dissenting. 1. The assignment of error with which the majority of the court declines to deal would have been authorized according to the established common-law practice in courts which had jurisdiction to review decisions of other courts upon writs of error.
2. The common-law practice in such cases was recognized in this State by a line of physical precedents, unquestioned by the bar and uncriticised by the bench, from the time the Supreme Court was established in 1846 until 1898.
 3. The act of 1898 (Van Epps's Code Supp. § 6241) was held, in *Taylor v. Reese*, 108 Ga. 379, to be merely declaratory of the existing common-law practice.

123	739
125	777
126	897
1126	898
e126	899
123	739
129	358
e129	359

4. The assignment of error is in accordance with the ruling of the majority in *Cawthon v. State*, 119 Ga. 395. No sufficient reason appears why that decision should not be followed.
5. I concur in the ruling made in the first headnote.
6. I dissent so far as the refusal to consider the other assignment of error is concerned.

Argued June 19, — Decided August 4, 1905.

Indictment for simple larceny. Before Judge Littlejohn. Webster superior court. April 5, 1905.

Homer Henderson was indicted for simple larceny. When the case was called for trial a practicing attorney stated to the court that he wished his name to be marked for the State to assist the solicitor-general, as he had been employed by the prosecutor. Defendant's counsel objected to the appearance of the attorney on behalf of the State, claiming that he had disqualified himself from appearing for the State, by reason of certain communications and negotiations which had passed between him and the defendant in regard to his representing the latter. The court overruled the objection, and the defendant assigned error on the ruling. The only other assignment of error is in the following words: "The following is a copy of the indictment, from which it will appear that the defendant was not arraigned and that he was not furnished a copy of the indictment, or a list of the witnesses sworn before the grand jury against him, nor did he waive the latter; to all of which defendant then and there excepted and now assigns the same as error. Defendant insists that he should have been furnished with a copy of the bill of indictment, and should have been allowed to plead guilty or not guilty." The presiding judge added to this statement the following note: "Defendant's counsel was asked by the solicitor-general if he would waive arraignment and plead not guilty and sign the waiver. Defendant's counsel replied he would; and it was not known to the court that defendant's counsel did not sign the waiver of copy indictment and list of witnesses, as the matter was never again mentioned." The copy of the indictment contained in the bill of exceptions shows that there was on it the following entry: "The defendant Homer Henderson waives being arraigned and pleads not guilty," signed "F. A. Hooper, solicitor-general." There was also on the indictment an entry of the waiver of the copy of the bill of indictment and list of witnesses sworn before the grand jury. This was not signed.

Payton & Hay, for plaintiff in error.

F. A. Hooper, solicitor-general, contra.

LUMPKIN, J. (After stating the facts.) 1. The assignment of error to the effect that the indictment showed that there was no arraignment, and that the defendant was not furnished with a copy of the indictment and list of witnesses, and did not waive this, can not be considered. The assignment of error refers to the indictment for verification, but an examination of it shows that an entry was made by the solicitor-general of a waiver of arraignment by the defendant and the entering of a plea of not guilty. The presiding judge also adds a note in which he negatives the claim that there was no waiver of the copy of indictment and list of witnesses, and shows that the defendant was not in any way cut off from the right to plead, but on the contrary agreed, through his counsel, to plead not guilty and waive the copy of the indictment and list of witnesses. The assignment is not verified, but rather negatived. See *McBride v. Beckwith*, 67 Ga. 764; *Fletcher v. Collins*, 111 Ga. 253; *Brice v. State*, 117 Ga. 466; *Adams v. State*, 117 Ga. 302. As to waiving arraignment see *Hudson v. State*, 117 Ga. 704.

2. In the case at bar it is not necessary to decide whether or not, under the evidence, the relation of the attorney to the defendant was such as to preclude him from appearing for the prosecution; or whether, under the circumstances, the court erred in allowing such appearance. No motion for a new trial was made; nor was the evidence introduced on the merits of the case brought up in the bill of exceptions; nor was any exception taken to any final judgment. Under these facts, we are unable to hold that the ruling of the court requires a new trial, whether it was correct or erroneous. In *Brown v. Atlanta*, 66 Ga. 76, it was said: "When a plaintiff in error brings a case here, he must show error which has hurt him. This court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party." In *Smith v. Smith*, 112 Ga. 351, it was said: "When there is no motion for a new trial, an erroneous or inapt charge to the jury, which did not necessarily control their verdict against the plaintiff in error, will not be treated by this court as affording cause for reversing the judgment of the court below." In *Ocean Steamship*

Co. v. Hamilton, 112 Ga. 901, it was said: "A party dissatisfied with a verdict can not, without filing a motion for a new trial, properly bring to this court for review any 'ruling, order, decision, or charge' of the court below, which did not, either singly or in connection with another or others, necessarily control the finding against the plaintiff in error." In *Ray v. Morgan*, 112 Ga. 923, it was said: "As there was no motion for a new trial, and it plainly appears that none of the charges excepted to necessarily controlled the verdict against the plaintiff in error, these charges, even if for any reason inapplicable or erroneous, afford no cause for reversing the judgment of the court below." In *Darien Bank v. Clarke Lumber Co.*, 112 Ga. 947, 951, the same ruling was made. In *Cable Co. v. Parantha*, 118 Ga. 913, it was said: "The charges of the court complained of by direct exceptions in this case, when considered in connection with the entire charge, the evidence, and the verdict rendered, do not appear to have been necessarily controlling." See also *Price v. High*, 108 Ga. 145; *Johnson v. Willingham*, 110 Ga. 307; *Benton v. Singleton*, 114 Ga. 548; *Parker v. Medlock*, 117 Ga. 813.

In *Cawthon v. State*, 119 Ga. 395, the practice in regard to carrying cases to the Supreme Court by direct bills of exceptions was discussed. The majority of the Justices, as the court was then constituted, thought that the exceptions made in that case were reviewable by direct bill of exceptions. Fish, P. J., and Candler, J., dissented. The positions of the majority are learnedly and forcibly set out in the opinion of Mr. Justice Cobb. The positions of the minority are clearly stated by Mr. Presiding Justice Fish in a headnote and Mr. Justice Candler in an opinion. A few suggestions will suffice to show some of the reasons which incline the writer to the view then entertained by a minority of the Justices, and convince him that the ruling excepted to in the present case can not be cause for reversal in the absence of a motion for a new trial or the bringing before this court of the evidence in the case. In the first place, the decisions already cited are directly in point, and at least two of them (*Smith v. Smith*, 112 Ga. 351, and *Cable Co. v. Parantha*, 118 Ga. 913) were concurred in by a full bench of six Justices, and have never been overruled or modified. It was said by Mr. Justice Cobb, in the *Cawthon* case, that if anything said or ruled in the two cases last

named was in conflict with *Taylor v. Reese*, 108 Ga. 379, the later decisions must yield to the earlier ruling. I do not think that there is any essential conflict. In *Taylor v. Reese* an application for mandamus was made, to compel the presiding judge to certify a bill of exceptions, which he had refused to do on the ground that, in the absence of a motion for a new trial, he had no authority to do so. It appeared that the presiding judge cut the defendant off from the contention that, if any offense was committed at all, it was not murder, but a lower grade of homicide. An examination of the bills of exceptions (two cases being heard together) will show that the evidence was brought before this court, and that exceptions were taken to certain rulings which entirely excluded a substantial part of the defense, and thus controlled the case to the extent of preventing the jury from considering the question of whether the homicide was manslaughter or not, which was the only real issue, the killing not being denied. The mandamus was granted. It was said that the court would not consider the merits of the questions presented, or whether there was in fact reversible error, on the application for mandamus. Lumpkin, P. J., who wrote the opinion, said: "Such a practice would not only be anomalous, but, as a result thereof, it would frequently happen that cases of the utmost importance would, for all practical purposes, be finally determined before they reached this court in the manner prescribed by law, and that, too, without even notice to parties vitally interested." The report of the cases when heard on their merits (*Taylor v. State*, 108 Ga. 384) will show how entirely different were the bills of exceptions then under consideration from that now before the court. In the opinion it was said: "In view of Taylor's admission on the trial that he did the killing, and of the fact that he did not ask for a verdict of not guilty but only that his offense be graded, the refusal of the judge to charge upon the law of either voluntary or involuntary manslaughter was, under the circumstances, equivalent to an adjudication from the bench that Taylor was guilty of murder, and the charge given amounted to an instruction to the jury to convict him of that offense." The same Justice who prepared the opinions in the cases of *Taylor v. Reese* and *Taylor v. State*, also wrote the opinion in *Smith v. Smith*, supra. In the course of the latter opinion he used the following language: "It is in this connec-

tion to be noted that no motion for a new trial was filed in the court below, but that the defendants by a direct bill of exceptions complain of rulings made during the progress of the trial. While the act of December 20, 1898, expressly authorizes such a practice, it in terms provides that such rulings only as necessarily controlled the verdict or judgment rendered can in this manner be properly brought under review in this court." And in support of this statement he cited Acts of 1898, p. 92, and *Taylor v. Reese*, 108 Ga. 379. Evidently the court did not think the two adjudications were in conflict.

The mere fact that an examination of the records of this court will show a number of instances in which cases were thus brought up for review, and in which no point was made or decided in reference to the method of exception, is of little force. I venture the assertion that a careful scrutiny would discover hundreds of records in which there were defects or lack of technical accuracy, but where no question was made or decided on the subject. A single illustration will suffice. In the case of *Allen v. Allen*, 63 Ga. 732, a demurrer was overruled, and after verdict a motion for a new trial was made, one of the grounds of which alleged error in the overruling of the demurrer. No objection was raised to this mode of procedure, and the judgment was reversed because the demurrer should have been sustained. The learned Chief Justice mentions in the opinion that the overruling of the demurrer was made a ground of the motion for a new trial. This is what is sometimes called a "physical precedent," and yet it has been held that the overruling of a demurrer does not furnish a proper ground of a motion for a new trial, but that a bill of exceptions pendente lite or a direct bill of exceptions should be filed thereto. *Griffin v. Justices*, 17 Ga. 96; *S., F. & W. Ry. Co. v. Renfroe*, 115 Ga. 774. In very truth the expression "physical precedent" merely indicates that a thing has been done, but not that it has been decided to have been rightly done. Of course this is said with entire respect for the great judges who have presided on this bench and the many great lawyers who have practiced at this bar.

Prior to the Code of 1895 the provisions for excepting in civil and criminal cases were included in the same section of the code. It declared that "either party in any civil case, and the defendant in any criminal proceeding in the superior courts of this State,

may except to any sentence, judgment, decision, or decree of such court, or of the judge thereof, in any matter heard at chambers," etc. Code of 1863, § 4160; Code of 1882, § 4251. In the Code of 1895 the same provision is made in Civil Code, § 5527; and in the Penal Code it is also inserted, omitting the words, "either party in any civil case, and," and the word "decree." Penal Code, § 1070. Decisions on this point in civil cases are therefore applicable also in criminal cases. Under that broad statement it was nevertheless considered necessary that there should have been some ruling or decision of a vital or controlling character, in order to furnish ground for direct exception. Thus, in *Miller v. Speight*, 61 Ga. 460, it was said: "When the court has erroneously ruled out evidence without which the plaintiff could not possibly recover, his failure to go on and prove other essential facts will not cure the error and sanctify a judgment of nonsuit." And this was reaffirmed in *Vaughn v. Burton*, 113 Ga. 103 (3). Even under the language of the act of 1845 (see 1 Ga. VII, VIII, sec. 4) there must have been a decision, sentence, judgment, or decree, which quoad the subject-matter of it must not have been inchoate or interlocutory, but final. In some cases the judgment might have been interlocutory as to the cause, as orders to dissolve injunctions and upon motions for new trials. As said by Nisbet, J. (13 Ga. 508), "We are not willing to entertain a writ of error where no result follows our judgment beneficial to either party." For decisions prior to the Code of 1863 see *Carter v. Buchanan*, 2 Ga. 337; *Jones v. Dougherty*, 11 Ga. 305; *Van Ness v. Cheeseborough*, 11 Ga. 377; *Evans v. Adams*, 12 Ga. 44; *Johns v. Fuller*, 13 Ga. 507. In the Code of 1863, § 4250, it was declared that "No cause shall be carried to the Supreme Court upon any bill of exceptions so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause." Exceptions pendente lite could be filed to rulings pending the cause, and upon exception to the Supreme Court, after final judgment, error could be assigned thereon, "and a new trial may be allowed thereon when it is manifest that such an erroneous decision of the court has or may have affected the final result of the case." This was carried forward in the Code of 1882, and, with a slight

amendment, in the Code of 1895. Code of 1882, § 4250; Civil Code, § 5526; Acts 1890-1, p. 82. Decisions since the Code of 1882 have been cited above. See also *Harrell v. Tift*, 70 Ga. 730, and dissenting opinions in *Cawthon v. State*, 119 Ga. 395, *supra*, and *cit.*

In 1898 an act was passed with the following caption: "An act to dispense with a motion for a new trial and filing brief of the evidence, and to authorize a direct bill of exceptions, in certain cases." The act declares, that, "In any case now or hereafter brought, where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision, or charge of the court, it shall not be necessary to make a motion for a new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of." Acts 1898, p. 92. An inspection of this act seems to indicate that its language is stronger than that previously employed in the code. It distinctly declares that exception may thus be taken "where the judgment, decree, or verdict has necessarily been controlled by one or more rulings," etc. Moreover the language used in the caption, where the act is described as one to "dispense with a motion for a new trial and filing brief of the evidence, and to authorize a direct bill of exceptions, in certain cases," might well be urged as indicating that in the mind of the legislature it was necessary to dispense with something which could not previously be dispensed with, and to authorize something which needed authorization; and that the dispensing and the authorizing were applicable only in certain cases of the character described in the act. What the decision in *Taylor v. Reese* was has been referred to above. If a sentence in the opinion is to be treated as a decision that this act was merely a declaration of the law as it already existed, on its face it appears to be a very plain declaration. The only difficulty arises in its practical application, in determining what rulings, orders, decisions, or charges are such as fall within its descriptive terms as necessarily

controlling the judgment, decree, or verdict. In some cases it is clear and easily determined. In others a decision of the question is attended with more difficulty. Thus (if the act be treated as declaratory) before 1898 it was held that the direction of a verdict or the grant of a nonsuit was such a ruling. *Haskins v. Throne*, 101 Ga. 126. If the striking of a plea cut off a legal and valid defense which constituted the real merit of the defendant's contention, whereby a verdict for the plaintiff resulted, this was held to be a controlling ruling. *Haskins v. Bank*, 100 Ga. 216. In *Wright v. Hollywood Cemetery Co.*, 112 Ga. 844 (decided in 1900), it was said: "When upon the hearing of a demurrer to a petition the court passed an order in effect striking a portion thereof and limiting the plaintiffs' right of recovery to specified items, their right to except to such order was not lost because they consented to so much of a verdict which the court directed in their favor as related to the amount they were entitled to recover upon such items." In the case of *Taylor v. Reese*, as already noted, the charge excluded from the jury the real ground of defense. These instances are merely illustrative. Generally, although errors in practice, or in the admission or rejection of evidence, or in similar rulings pending the trial, may have been made, yet if they do not necessarily control the result, but merely go in to partly make up the aggregate of the case, upon the whole of which a verdict or judgment is reached, they can not be selected and made the subject of direct exception and assignment of error requiring a reversal. This is especially true in the absence of the evidence introduced on the trial. Rulings on evidence may possibly be of a controlling character. Thus, if suit be brought based on a note, and the note be ruled out of evidence; or on a deed, and it be rejected, so that the case is substantially cut off by the ruling, and an adverse judgment necessarily results (as in *Miller v. Speight*, supra), this may be controlling. Erroneous rejection of a piece of evidence indispensable to the making out of any case at all by a plaintiff, or without which there can not possibly be a recovery, and the rejection of which, ipso facto, results in an adverse judgment, may stand on this basis. But the rejection of merely additional or cumulative, rebutting, or impeaching evidence will not do so.

Where a case is brought up, not as a whole, or after a motion

for a new trial, but by direct exception, assigning error in a particular ruling, the controlling character of that ruling must be made to appear. In very many long and hotly contested cases some errors are committed, in rulings on evidence, in certain expressions in the charge, or in like rulings in the progress of the trial; and yet, in the light of the whole case, they are corrected or explained, or do not furnish ground for reversal. The reports teem with such decisions. No longer ago than July 17th, in the case of *Allams v. State*, 123 Ga. 500, it was held that there was error in a certain charge, but in view of the whole case it did not necessitate a reversal. See also *Perry v. State*, 102 Ga. 365. All rulings are controlling on the identical point ruled, but this is not what is meant. It is when "the judgment, decree, or verdict has necessarily been controlled"—not possibly affected, but necessarily controlled, that reversal may be had in this mode. If every slip of the tongue, or every erroneous ruling made by a judge pending a trial, can be segregated from its surroundings and other parts of the case, without showing its controlling character, and a reversal can be had on account of it, regardless of whether the evidence may have demanded the verdict or judgment, it would amount at times almost to the trial judge passing on one case and this court on another. The present case emphasizes the rule. None of the evidence introduced on the trial is brought to this court, nor even the statement of the accused. Suppose the evidence had showed conclusively and without conflict that the defendant was caught *flagrante delicto*; or suppose that his own statement showed beyond question that he was guilty, of what avail would it be to direct a new trial because of some error which might not, and possibly could not, have affected the result? The supposition that the defendant's statement may be sufficient to warrant a conviction is not strained. Thus in *Wood v. State*, 119 Ga. 426, it was held that a verdict for assault with intent to murder was demanded by the defendant's own statement "without regard to any" of the rulings of the court of which complaint was made." See also *Luby v. State*, 102 Ga. 633; *McKinley v. State*, 121 Ga. 192. In the absence of the evidence, it is not practicable in many cases for this court to determine whether an error complained of was such as to cause injury or not. If it be

suggested that the ruling in regard to the attorney tainted the whole trial, it may also be said that any error taints a trial to some degree; but to have a reversal by this mode of exception, it must be to a degree which necessarily controls.

There are two ways by which a case may reach this court. One is by the usual and ordinary methods of procedure. The other, for convenience, may be called the short form. It is stated in the second headnote. But to pursue this course successfully, it must be made to appear to this court that the judgment, decree, or verdict was necessarily controlled by such ruling or rulings, order, decision, or charge, and not merely that, standing alone, it or they may appear to be erroneous. It is not every error, but only necessarily controlling rulings, which may be segregated from the case, stripped from their surroundings, and brought to this court alone as successful grounds for a reversal. We are therefore of the opinion that, whether the court ruled correctly or not in regard to permitting the attorney to take part in the trial, in the absence of the evidence it can not be held that the ruling will require a reversal. Speaking for myself, it is not perfectly clear to me whether the result should be a judgment of affirmance or one of dismissal, but my brethren think the latter the more logical sequence. The practical result is the same.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent, and

COBB, J., dissenting. "A writ of error is an original writ, issuing out of chancery; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record; and is in the nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and on such examination to affirm or reverse the same, according to law." "A writ of error lies for some error or defect *in substance*, that is not aided, amendable, or cured at common law, or by some of the statutes of amendments or jeofails." 2 Tidd's Pr. 1134, 1136; 3 Bacon's Abr. 320 et seq.; 9 Vin. Abr. 474. Upon a writ of error only those matters are brought up which are properly a part of the record, or which are placed upon the record pursuant to the statute which provides for bills of exceptions. Errors of the court only can be corrected upon

writ of error. 2 Cyc. 512. An error of fact could not at common law be reviewed upon writ of error. 3 Bl. 406; Heard's Steph. Pl. 96, 118. Hence it followed that when an error of fact was complained of in a motion for new trial, a judgment refusing a new trial could not be reviewed upon writ of error. See, in this connection, *Van Stone v. Stillwell Mfg. Co.*, 142 U. S. 128; *Wilson v. Everett*, 139 U. S. 616; *Moore v. United States*, 150 U. S. 57. Such was the origin, scope, and purpose of the writ of error under the common law. That provision of the constitution under which the Supreme Court of this State was organized provided that that court should sit "for the trial and determination of writs of error" from courts of a given class. Cobb's Dig. 1120. The language quoted is preserved in the present constitution. Civil Code, § 5835. In each of the constitutions of this State the Supreme Court has been limited in its jurisdiction as a court for the correction of errors, having no original jurisdiction. The writ of error had its origin in the common law, and became a part of the law of this State under the adopting statute, and is still effective in any case where it is appropriate as a remedy to be pursued, unless there has been a statute abolishing it or limiting it in its operation. The scope of the writ of error as indicated in the above quotations was recognized in *Allen v. Savannah*, 9 Ga. 286. See also *Tarver v. Rankin*, 3 Ga. 213; *Harris v. State*, 2 Ga. 211. In *Gaulden v. Shehee*, 20 Ga. 531, the constitutionality of the act declaring that the certificate of the judge to the bill of exceptions should be the writ of error was under consideration; and it was there held that it was competent for the legislature to provide that the power formerly exercised by the King of England through the chancery courts in issuing writs of error might be delegated by the State to the judges of the superior court. Prior to the date of the act just referred to, the writ of error was issued by the clerk of the Supreme Court in the name of the governor, bearing test in the name of the judges. See Rule 24, 1 Ga. xvii. See also *Harris v. State*, 2 Ga. 211. As said by Judge Lumpkin, the constitution could not have intended that the writ of error should be the common-law writ, because there was no court of chancery in Georgia to issue it, and therefore it was within the power of the General Assembly to regulate the issuance of this writ and pre-

scribe by whom it should be issued. But neither in that decision, nor in any other to which my attention has been called, has it been held that the writ of error under the Georgia practice, in its scope and purpose, was anything less than the writ of error of the common law issued out of chancery. See, in this connection, *Harris v. State*, 2 Ga. 211. The jurisdiction of this court has been so extended as to authorize a writ of error to review a decision granting or refusing a new trial upon the facts, a proceeding that was unknown to the common law; that jurisdiction being upheld upon the broad language of the act establishing the court, which gave it jurisdiction to review any decision or judgment of the superior courts. This result was reached in the early history of this court by the application of a fiction, and has since been acquiesced in. See *Kelly v. Strouse*, 116 Ga. 887.

Under the common-law practice a reversal of the judgment under review was authorized upon a writ of error, whenever there appeared upon the record an error of law which was substantial in its nature, and by which the party complaining was or might have been prejudiced. A reversal would not result if the error was immaterial, and therefore not prejudicial; but upon the hearing of a writ of error, where exception had been taken to any decision on the question of law, it was not only the right of the party to demand a decision, but it was the duty of the court to determine whether the exception so taken was well founded. The court might hold, as it did in numerous cases, that the exception was without merit or was upon an immaterial point, but the court had no authority to refuse to consider the exception as made. At the time the Supreme Court of Georgia was established, and for more than a quarter of a century thereafter, the bench and the bar of the State were composed of men who were thoroughly conversant with the principles and practice of the common law, and the technical term of the common law used in the constitution was undoubtedly therein placed to be interpreted in its common-law sense, subject only to such limitations as might be found in the statutes of this State. I am well aware that a single physical precedent is worth little as authority. I am free to concede that several physical precedents of the same nature will not carry controlling weight. But when for twenty-five years and more there is an accumulation of physical prece-

dents which are in accord with common-law practice, and no criticism of any nature whatever upon these precedents is made by the bench or the bar, the former fully capable of detecting and criticising, and the latter not only capable of detecting, but perfectly willing to take advantage of any defects in practice that might exist, these precedents, even though they be merely physical, multiplied under such circumstances, piled one upon another, mountain high, command my respect and control me in my views. If I were tempted to entertain other views, reverence for the unquestioned learning of those who for so long a time passed these precedents unchallenged would constrain me to surrender them. The act of 1898 has been held by a unanimous decision of this court to be only declaratory of existing practice (*Taylor v. Reese*, 108 Ga. 379); and later cases conflicting with it are required under the statute, to yield to it. There can be no two opinions as to what was the common-law practice in reference to writs of error. Neither can there be any serious difference of opinion on the question as to whether this practice was recognized by the profession, both bench and bar of this State, for a long period of time. Treating this act as declaratory, a necessarily controlling decision under the act of 1898 would be a decision which was alleged to involve the commission of an error of law which was substantial in its nature. Such a decision was a necessarily controlling decision at common law, in the sense that a reversal upon writ of error would result, and such a decision is a necessarily controlling decision in Georgia. If the act of 1898 be interpreted as legislation introducing a new rule of practice having no reference to the past, it might be possible for the conclusion to be reached that the word "control" should be given the meaning that the decision under review must *constrain* a particular final judgment in the case. But in interpreting acts of the legislature in reference to matters of substantive law as well as of practice, it is neither right nor safe for the courts to shut their eyes to the history of the past in reference to the subject-matter of the legislation.

Usually it is with much hesitation that I place upon the records of this court an expression of my opinion when it is in conflict with that of a majority of the members of the court, and especially is this so when my views do not coincide with any of those

who are participating in the decision of the case. I am not now altogether freed from this hesitancy, but nevertheless it does seem clear to me that I am merely contending for the recognition of a rule of practice that was well settled at common law, and recognized by the concurrent voice of the bench and bar of Georgia when each was made up of lawyers thoroughly trained in the principles controlling the practice at common law. I am also sustained by the unanimous decision of this court, in the case of *Taylor v. Reese*, 108 Ga. 379, as I understand that decision. The views now expressed were authoritatively announced as the opinion of five Justices at the time the case of *Kelly v. Strouse*, 116 Ga. 872, was decided; and the identical question now involved was resolved, in the way it seems to me it ought to be resolved, by four Justices in *Cawthon v. State*, 119 Ga. 395. Among them was the present Chief Justice and Mr. Justice Turner, each trained for the bar at a time when a knowledge of common-law practice was deemed necessary to the successful practice of the profession, and Mr. Justice Lamar, who was himself the author of the act of 1898.

The assignment of error upon the refusal of the judge to prohibit the attorney to appear as counsel for the State should be considered by this court on its merits. It is not necessary for me, under the present status of the case, to intimate whether this assignment of error is meritorious, but it is before this court in due form, and is entitled to consideration and decision. What has been said, taken in connection with what is set forth in the majority opinion in the *Cawthon* case, fully expresses my views in reference to this matter. The views expressed are due to a settled conviction, reached after a laborious and anxious investigation when the *Cawthon* case was under consideration. If I could possibly view the question in any way where there was a doubt, I would gladly yield the doubt and let the practice be settled by an unanimous decision, notwithstanding what I have said on two former occasions. It is a matter of regret to me that my legal vision is so beclouded that I can not see as the truth that which seems so clear to my brethren. The scales may hereafter fall from my eyes, but until that time arrives I must adhere to the truth as it now appears to me.

GRIMES v. THE STATE.

- FISH, P. J. 1. On the trial of one indicted for voluntary manslaughter, the evidence of the State's witnesses, if believed, made out a case of murder, while the statement of the accused, if all of it were believed, showed the homicide to be justifiable; if, however, part of the statement were believed and the balance disbelieved, the offense committed was voluntary manslaughter. *Held*, that as the jury are free to give the prisoner's statement such credence as they think proper and may therefore believe all or a part of it as they see fit, a charge on the law of voluntary manslaughter was proper, and that a verdict finding the accused guilty of that offense was not unwarranted.
2. A new trial will not be granted on account of newly discovered evidence which is merely of an impeaching character; nor on account of alleged newly discovered evidence of any kind, when movant's counsel files no affidavit of his ignorance, before the verdict, of the existence of such evidence.
3. An exception to a correct charge on voluntary manslaughter was not well taken when the error assigned was that "the court should have gone further and submitted the question of involuntary manslaughter."
4. The court did not err in charging the doctrine of reasonable fears as contained in the Penal Code, § 71.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 10, — Decided August 4, 1905.

Indictment for voluntary manslaughter. Before Judge Reagan.
Fayette superior court, May 26, 1905.

J. W. Wise, for plaintiff in error.

O. H. B. Bloodworth, solicitor-general, contra.

CITY OF SYLVANIA v. HILTON.

1. If a municipal ordinance prohibiting buildings of a certain character from being erected within prescribed fire limits is not clear, but of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed upon it by the municipal authorities, in order to aid in its proper construction. But if the meaning of an ordinance is plain and unambiguous, the fact that it may have been repeatedly violated without objection on the part of the municipal officers will not alter its meaning or furnish any defense to one who afterwards violates it.
2. A building constructed by erecting a wooden frame and covering it on the outside with sheets of corrugated iron, the interior, including the flooring, ceiling, etc., being entirely of wood, does not meet the requirements of a municipal ordinance which declares that within certain fire limits all buildings shall be constructed of brick, stone, or other incombustible material and covered with tin or metallic or fireproof roofing.

3. It was error to grant an injunction against municipal officers to prevent them from enforcing such ordinance against the building of a structure such as that described in the preceding headnote.
4. In so far as the ordinance is criminal in its nature, the owner of the house being built can assert his rights by defense against a prosecution under such ordinance.

Argued June 28, — Decided August 4, 1905.

Injunction. Before Judge Rawlings. Screven superior court. April 14, 1905.

L. H. Hilton filed his equitable petition against the mayor and council and marshal of the City of Sylvania, alleging as follows: Under the act of February 20, 1875 (Acts 1875, p. 186), the town of Sylvania, which had been chartered under the general laws of the State, and located in the county of Screven, was reincorporated, to be governed and controlled by sections 774 to 797, inclusive, of the Code (now sections 684 to 710 of the Political Code of 1895); and under an act of the legislature approved December 12, 1902 (Acts 1902, pp. 636, 637), it was made the City of Sylvania, the laws and ordinances of the town being left in force and made applicable to the city. On January 7, 1897, the main business block and business portion of the town were destroyed by fire, and immediately thereafter, on January 13, an ordinance was passed of which the following are the material portions:

"An ordinance to prescribe the fire limits of the town of Sylvania, to prevent the erection of wooden buildings therein, and for other purposes.

"The common council of the town of Sylvania do ordain, that from and after the passage of this ordinance the fire limits of said town shall be the space embraced within the following territory, to wit: [describing it].

"Section 2nd. Be it further ordained, that all buildings hereafter to be erected within said fire limits on said lots and closed street shall be constructed of brick, stone, or other incombustible substance or material, and covered with tin or metallic or fireproof roofing. Provided, it shall and may be lawful to repair any wooden building now erected on said lots or closed streets, or to build any barn, stable, or other outbuilding under any sheltered or covered roof now standing, with the permit of the mayor.

"Section 3rd. Be it further ordained, that no wooden building shall be erected on the lots adjacent to said fire limits, except

by special permit of the mayor, who shall examine the locality upon which it is sought to erect said wooden building, and determine whether the erection thereof will endanger other buildings near by.

"Section 4th. Any person erecting or attempting to erect any wooden building in violation of this ordinance shall be punished by a fine not less than \$5.00, nor more than \$50.00, and imprisoned not more than thirty days, in the discretion of the mayor, and for the second offense said parties shall be fined not less than \$10.00, nor more than \$100.00, and imprisoned not more than thirty days.

"Section 5th. Be it further ordained, that any building erected in violation of this ordinance shall be deemed a nuisance; and if the party erecting or causing same to be erected, or who erected the same, shall fail or refuse to have the same removed after being duly notified, the mayor shall cause the same to be removed by the marshal at the expense of such party."

The plaintiff alleged, that the purpose and intention of the ordinance was to require buildings thereafter erected in the fire limits, if framed or constructed of wooden material, to be covered on the outside with some incombustible material or substance, such as tin or iron, and that such construction, from the passage of the ordinance to within a few days prior to the filing of the petition, had been placed on the ordinance by the mayor and council, by permitting and allowing a number of buildings to be erected within the fire limits since the ordinance was passed. Two persons, one of whom was a member of the council, were preparing to erect buildings to be framed of wood covered with sheet iron, and the mayor and council were not making any effort to prevent this, and never contended that such buildings were prohibited by the ordinance until very recently, when plaintiff was about to erect a small restaurant within the fire limits, to be so framed of wooden material and covered on the outside with corrugated iron, an incombustible material or substance. The restaurant which was being erected was to be leased to a colored woman, which met with the disapproval of the mayor and council, and for that reason alone they were endeavoring to prevent him from erecting the building. On March 6, 1905, at a called meeting, and without notice to him or giving him a chance to be heard, they had

passed an ordinance declaring the building to be a nuisance, and ordering it to be removed immediately, and served notice upon him that unless he removed it they would cause it to be done. In February, 1905, the marshal, under order of the mayor, arrested him for violating the ordinance, and without a trial imposed a fine of ten dollars on him, to which sentence he had entered an appeal to council as provided by the ordinances. Section fourth of the ordinance under which the fine was imposed is void, because the mayor and council can not impose a fine exceeding fifty dollars, nor imprison more than thirty days, and such imprisonment can only be in the alternative, while the ordinance seeks to provide a fine exceeding fifty dollars, and provides for a fine and imprisonment at the same time. Plaintiff contends that the building was not in violation of the ordinance. If defendants are allowed to tear down the building as they are threatening to do, and continue to harass him, he will be irreparably damaged. He prayed that they be enjoined from tearing down or interfering with the erection of the building, and from enforcing the prosecution against him for a violation of the ordinance.

The defendants' answer was, in brief, as follows: They admitted the incorporation of the city and the passage of the ordinance. They denied the construction placed by the plaintiff thereon. "These defendants answer that they are not bound by the construction put upon the ordinance by other city authorities, or by any mayor or council of Sylvania which has been in authority heretofore; and while the present city authorities think that some of the buildings mentioned in said fifth paragraph of petitioner's petition were erected not in compliance with said ordinance and in violation of same, that the proper construction of these buildings is not now under consideration, and has no bearing upon the determination of the present case." They admit that two persons are erecting buildings within the fire limits in violation of the ordinance, but deny that they expect to allow such buildings to be completed in that manner. When plaintiff was about to begin erecting, or had just erected, the pillars upon which he expected to construct a small restaurant within the fire limits in violation of the ordinance, in order to save him from loss they notified him of their construction, and of their intention to prevent him from building it, "not entirely for the reason that he

expected to lease said restaurant to a colored woman whose past conduct in the town they did not approve of, but for the additional reason that the building of a restaurant in the main business block, and right in the rear of a number of mercantile establishments, and where combustible substances were liable to be ignited by sparks from said restaurant, and cause danger from fire to be considerably increased." They admit the passage of the order declaring the building to be a nuisance and directing it to be removed, but deny that it was necessary to give him notice before doing so, as he knew well the meaning of the ordinance, and the order was passed so as to give him an opportunity to test its meaning. They deny that he was fined without a trial, and say that he appeared and admitted that he was erecting the building, and, as according to the construction of the mayor and council he was doing so in violation of the ordinance, he was fined, and there was no need of any further trial. The entire inside of this building is not even covered with any incombustible substance, but will be wholly of wood, and exposed to fire. To construe the ordinance as plaintiff seeks to do would practically nullify it, and destroy the beneficial results that were intended to be reaped from adopting it.

After hearing evidence the presiding judge granted the injunction, and defendants excepted. They assign error because of the admission, over objection, of evidence as to what certain witnesses thought the mayor and council meant by the passage of the ordinance; because another witness was allowed to testify, over objection, as to the construction placed upon the ordinance by various officers of the city at the time of its passage, and since; because of the grant of injunction; and because the court erred in not construing the ordinance in accordance with its written words, instead of according to parol testimony that other buildings of like character had been constructed since its passage, and held that this building could be erected because the city authorities had allowed other buildings of like character to be erected in the past.

H. S. White, for plaintiff in error. *E. K. Overstreet*, contra.

LUMPKIN, J. (After stating the facts.) Some of the evidence introduced by both sides was incompetent, such as statements that "it was the understanding of deponent, and he thought that it was the understanding of other members of council," etc.; and

that "said ordinance meant," etc. The substantial question, however, is whether the ordinance was so clear and unambiguous as not to require the aid of extrinsic evidence for its construction, or whether resort could be had to evidence that other buildings had been erected similar in character to this one, without objection on the part of the municipal authorities, for the purpose of throwing light on the meaning of the language used. If an ordinance is plain, clear, and unambiguous, it needs no aid from parol evidence for its proper construction. In such event the mere fact that it has been violated several times or many times would afford no excuse or reason for another violation, nor would it confer any right on others to violate it. To illustrate, if an ordinance prohibited the shooting of firearms within the corporate limits, upon the trial of one who violated it the fact that others had committed a like breach of the ordinance and had gone unpunished would furnish no defense to him. So it is also in regard to a State law. It would be no defense to one tried for larceny to show that many other larcenies had been committed and the criminals had escaped without prosecution or punishment, although known. If, however, a building ordinance, or an ordinance prescribing fire limits is not clear, but is of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed upon it by the municipal authorities, in order to arrive at a proper construction of it. 1 Dill. Mun. Cor. (4th ed.) § 93; 1 Smith's Mun. Cor. §§ 540, 541; McQuillin's Mun. Ord. §§ 73, 289, 290; *State v. Severance*, 49 Mo. 401; *Cole v. Skrainka*, 105 Mo. 303; *Saunders v. Nashua*, 69 N. H. 492. In *McQuillin on Municipal Ordinances*, § 292, it is said: "The general rule is that the meaning of an ordinance must be gathered from the law itself, and not from contemporaneous statements of the individuals who framed it or those who voted for it. This rule is particularly enforced where the provisions of the ordinance are clear. In such case, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible to aid its construction. However, in doubtful cases where the language of the ordinance is ambiguous, a contemporaneous construction adopted by the parties interested in the enforcement of the ordinance, while not controlling, is entitled to great weight." See also *Tiedeman on Mun.*

Cor. § 159. The rule is similar in construing statutes. *Brown v. U. S.*, 113 U. S. 568; *Sherwin v. Bugbee*, 16 Vt. 444; *Frazier v. Warfield*, 13 Md. 279. So, if the terms of a contract are clear and unambiguous, they can not be changed by proof of usage. *Kimball v. Brawner*, 47 Mo. 398. The question then is, within which of these rules does the ordinance under consideration fall? It is clear that the construction sought to be put upon it by the plaintiff can not stand. The expression, "and covered with tin or metallic or fireproof roofing," plainly refers to the roof of the building, not to its sides. Certainly it can not be contended that the municipal council intended to provide for a building to be covered all over with roofing, whether tin, metallic, or fireproof. Roofing means the materials for a roof, and it needs no argument to show that this ordinance did not mean to provide for covering the sides of the house with materials for the roof.

The only question remaining, then, necessary for a construction of this part of the ordinance, is whether the word "incombustible" is ambiguous so as to allow it to be construed by parol evidence showing that other houses had been built similar in character to that of the plaintiff. The Century Dictionary defines the word to mean "not combustible; incapable of being burned or consumed by fire." In *Payne v. Wright* (1892), L. R. 1 Q. B. Div. 104, the meaning of the word was under consideration. The metropolitan building act provided that the roof of every building should be covered externally with "slates, tiles, metal, or other incombustible materials." The roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wire work uninjured. It was held that the roof was not covered with "incombustible materials" within the meaning of the act. Mathew, J., said: "The findings of the magistrate seem, however, themselves to answer the question put to us, for he finds as a fact that the material was partly combustible and partly incombustible. Upon these findings how is it possible for us to say that, as a matter of law, this material was incombustible within the meaning of the act? . . . It is true that the magistrate finds that this material is, for some reasons, safer than glass, but that does not make it incombustible." A. L. Smith, J., said: "Sect. 19 provides that the roof of

every building shall be covered with slates, tiles, metals, or other incombustible materials. Does that mean 'other materials' which are wholly incombustible, or materials which are partly combustible and partly incombustible? In my opinion it means materials wholly incombustible." The evidence in the present case shows without controversy that the entire framework of the house is of wood, and that it is to be covered on the outside with thin plates of corrugated iron. There is no contention that wood is incombustible, so that the material of which the entire framework of the house is built is combustible, and only a part of the material used, being the outer coating or covering, is incombustible in character. There are also other parts of the building composed of wood, such as the floor, ceiling, etc. Thus the case cited is directly in point. In *Badley v. Cuckfield Union Rural Dist. Com.*, 72 L. T. R. (N. S.), (Q. B. Div. 1895) 775, the following ruling was made: "One of the bye-laws made by the defendants, as rural sanitary authority, required all new buildings to be 'inclosed with walls constructed with good bricks, stone, or other hard and incombustible materials properly bonded,' etc. The plaintiff proposed to erect a sanatorium for his school, consisting of corrugated sheets of galvanized iron one thirty-second of an inch in thickness, with a layer of felt inside, fixed to the outside of a framework of wooden upright and horizontal posts and rails, with wooden match-boarding inside. Held, that the galvanized iron alone was not a wall, and that the structure combined of wood and iron which constituted the wall was not of hard and incombustible materials as required by the bye-law." Lord Russell, C. J., in the opinion, said: "I think, therefore, for the purposes of this case we must regard the wall as consisting of at least the wooden post and frame and the sheets of corrugated iron. Can that be called a wall of incombustible material? I think decidedly not; and the case is made stronger if we include the felt and the match-boarding."

In *Ward v. Murphysboro*, 77 Ill. App. 549, an ordinance was under consideration which declared it unlawful for any person, company, corporation, or firm to erect, build, or commence the erection, within the fire limits of the city, of any wooden or frame building or structure exceeding a certain size. Certain persons erected within such limits a building having a wooden

frame structure, one side, the ends, and the roof of which were covered with wooden sheeting, and this was covered with corrugated iron, the spaces between the studding being filled with loose brick. As the building was nearing completion, the mayor, marshal, and aldermen of the city, without giving notice to remove the building, tore it down, for which the owners brought suit in trespass. The defendants pleaded in justification the ordinance referred to. The trial court declined, on request, to charge the jury, "The court further instructs you that the plaintiffs had a right to show by evidence, if they can, the fact, if such appears to be a fact from the evidence, that the city has permitted similar buildings to be erected and constructed, within the fire limits of Murphysboro, as the one alleged to have been torn down by defendants, for the purpose of showing the construction the city and its officers themselves place upon said ordinance as to what buildings it prohibited." On this point the appellate court ruled as follows: "If the city officers had tacitly allowed that portion of the city included in the fire limits to be filled with frame buildings no better than tinder boxes, such fact would have thrown no light upon the true construction of the fire ordinance. When the ordinance was duly passed and published, it became a law of the city, and the city officers had no more right to disobey the law or suspend it, enlarge or construe it away, than any other person." See also *Tuttle v. State*, 4 Conn. 68, 70. It has been said: "Where a municipal corporation has power to prohibit the construction of wooden buildings within a district and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceedings whatever." 13 Am. & Eng. Enc. L. (2d ed.) 400, and notes. As to the general powers of this municipality see Political Code, § 696. In *Stewart v. Commonwealth*, 10 Watts, 306, it was said: "On an indictment charging the defendant with erecting a wooden building within the City of Pittsburg, contrary to the ordinance, the jury found that he had erected a building composed partly of brick and partly of wood: Held, that such building was not within the ordinance." This decision, however, was made in a criminal case, where the rule of construction applicable to criminal laws applied. In the opinion Sergeant, J., said: "If this

were a remedial law, it might be construed liberally, so as to effectuate the design of the legislature, which was to guard against the danger of fires in a populous city. But being a penal statute, and this proceeding of a criminal cast, the rule of law is well settled, that such statutes are to be construed strictly, and that no one is to be brought within the penalty of the act who is not within the plain meaning of the words, strictly construed: and they are confined to wooden buildings only." The ordinance now under consideration only provides for punishment by fine and imprisonment if any person shall erect or attempt to erect "any wooden building in violation of this ordinance." A building of the character of that described in the evidence is not, strictly speaking, a wooden building, although, as held above, it is not constructed of incombustible material within the meaning of the ordinance. So far as the criminal proceeding is concerned, therefore, it is not sustainable under the ordinance. But it was not proper to grant an injunction to stop the prosecution, inasmuch, as the plaintiff can assert all his rights by way of defense.

That part of the ordinance which provides for notifying the owner to remove the building, and, on his failure or refusal to do so, that the mayor shall cause its removal, is not confined to a wooden building strictly so called, but applies to "any building erected in violation of this ordinance." Under the law we are of the opinion that the presiding judge erred in granting the injunction.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

SANDERS v. CENTRAL OF GEORGIA RAILWAY COMPANY.

- FISH, P. J. 1. The evidence which the court refused to admit, being hearsay, was properly excluded.
2. A ground of a motion for a new trial, assigning error upon the refusal of the court to permit a witness of the complaining party to answer a designated question, should show not only what answer was expected, but that the judge was informed as to it. *Leverett v. Bullard*, 121 Ga. 536.
3. An assignment of error upon the admission of testimony should show not only that it was admitted over objection of the complaining party, but what grounds of objection he urged at the time the evidence was offered. *Powell v. Ga., Fla. & Ala. Ry. Co.*, 121 Ga. 803.

4. On the trial of an action brought by an employee against a railway company, for personal injuries alleged to have been caused by the negligence of the company, the court charged the jury as follows: "Ordinary care and diligence is that care and diligence which every prudent man takes under the same or similar circumstances. You are to judge of the conduct, the diligence, the negligence, and the acts of the plaintiff and the defendant in this case by that rule." *Held*, that the definition given of ordinary diligence was correct (*Richmond R. Co. v. Mitchell*, 92 Ga. 77 (2)), and that the court did not express an opinion to the effect that the plaintiff was negligent any more than that he was diligent; the instruction meant that the jury should judge of (i. e. concerning) the conduct, the diligence, the negligence and acts of both parties by the application of the rule given.
5. In such a case it was not error to charge that in order for the plaintiff to recover it should appear from the evidence that at the time he was injured he "was in the exercise of ordinary care and diligence and was free from fault." If he were free from fault, as he had to be in order to recover, he was necessarily in the exercise of ordinary care. Moreover the petition alleged that at the time of the injury the plaintiff "was in the exercise of all ordinary care and diligence and was free from any fault whatsoever."
6. Nor was it error for the court in its charge to assume "that negligence of the company and its failure to exercise ordinary care and diligence were synonymous terms."
7. In order for an employee to recover in an action of the nature above referred to, it must appear from the evidence that he was free from fault contributing to his injuries, and that they were caused by the negligence of the company. If the plaintiff and the defendant were both negligent, or if they were both free from fault, in neither instance can the plaintiff recover. The instructions of the court on this subject, to which exceptions were taken, were in substantial accord with the rules above announced, and were not erroneous, at least for any reason assigned.
8. The court charged the jury: "Now, you look to the evidence and see whether or not it is shown that the bell was not rung, see what the truth of that is. If you find that the bell was rung, you need give no consideration to that allegation contained in the declaration. If you find . . . that the bell was not rung, as contended for by plaintiff, . . . then you look to the . . . evidence and see whether or not the railway company . . . [was] in the exercise of ordinary care and diligence." This charge did not ignore the issue as to whether or not the bell was rung; nor "was it error as not fully submitting the issue to the jury, in that the court did not tell the jury how and in what manner the bell should be rung in order to comply with the demand of diligence." Had the court so told the jury, it would have been an expression of opinion that the acts specified would constitute diligence.
9. The court properly instructed the jury not to consider the Carlisle mortality table, which was in evidence, if they should believe from the evidence that the plaintiff was not entitled to recover, or that his injuries were not permanent. There was no expression of "opinion on the facts" in such charge.
10. After the court had in its charge twice stated fairly and explicitly all the specifications of negligence alleged against the defendant in the petition, it was not cause for a new trial that in the same connection, and while instructing the jury to look to the evidence in order to ascertain the truth as

to each allegation and contention, the court omitted from its enumeration of such allegations one charge of negligence, it appearing that this portion of the charge closed with the statement that "all these matters and all these contentions wherein it is charged that the defendant company was negligent . . . are matters entirely for you to pass upon," under the evidence submitted and the law given in charge.

11. The verdict was amply supported by evidence, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 29, — Decided August 4, 1905.

Action for damages. Before Judge Hodges. City court of Macon. November 25, 1904.

The plaintiff was in the employment of the defendant as a car-greaser and repairer, and was injured by being struck by the tender of a locomotive, or by something that projected from it, at night. He contended, that he was in the performance of his duty, and was without fault; that the place where he was engaged was very dark, and he could not see or hear the approaching engine: that the defendant was negligent, in having no light on the end of the tender, in not ringing the bell, and in not otherwise giving warning of the approach of the engine. Under somewhat conflicting evidence, and the charge of the court, the jury found for the defendant. The plaintiff excepted to the refusal of a new trial, the grounds of the motion therefor being sufficiently indicated in the headnotes.

Marion W. Harris and John R. Cooper, for plaintiff.

Hall & Wimberly and J. E. Hall, for defendant.

GOULD v. JOHNSTON & COMPANY.

123	765
1129	267
1130	55
1130	572

1. The provision of the Civil Code, § 4324, that ten days notice of the time and place of the hearing of a motion for a new trial shall be given to parties at interest, applies only in a case where the trial judge, upon the application of one of them, in vacation fixes a time and place for the hearing during vacation.
2. No specific time is prescribed by statute within which the respondent shall be served with a copy of the rule nisi issued upon an application for a new trial, made in term under the provisions of the Civil Code, § 5484; and where service has been perfected in ample time to enable counsel for the respondent to prepare for the hearing of the motion on the day fixed by the order of the court, and it does not limit the time within which service shall

be made, the motion is not subject to dismissal on the ground that respondent was not served with a copy of the rule nisi within ten days after it was granted.

3. Under an order passed in term, fixing a day in vacation for the hearing of a motion for a new trial, and granting leave to the movant "to amend his motion and until the said day, and on said day, to amend and to perfect his brief of evidence in the case," it is the right of the movant, on the day set for the hearing, to present for approval a brief of the evidence and to file the same after it has been perfected and approved by the court.

Submitted June 29, — Decided August 4, 1905.

Motion for new trial. Before Judge Hodges. City court of Macon. November 26, 1904.

J. W. Preston Sr., for plaintiff in error.

Arthur L. Dasher, contra.

EVANS, J. This case was tried at the September term, 1904, of the city court of Macon, and resulted in a verdict in favor of the plaintiff. The defendant Gould made a motion for a new trial, which, by an order passed by the court at that term, was set for a hearing in vacation. On the day appointed, counsel for the movant announced to the court that he had prepared a brief of the evidence, which he desired to submit for approval. Counsel for the plaintiff stated to the court that he wished to interpose a motion to dismiss the motion for a new trial. Argument on this motion to dismiss was had, and the court passed an order sustaining the same. To this judgment exception is taken.

1. One of the grounds of the motion to dismiss was that no notice of the hearing, as contemplated by the Civil Code, § 4324, had been given to the respondent. The ten days notice in writing provided for in that section applies only to cases where no order is passed in term fixing the time in vacation for the hearing of a motion for a new trial.

2. Another ground of the motion to dismiss was that no copy of the rule nisi had ever been served upon the respondent. No evidence in support of this ground of the motion was offered. Indorsed upon the motion for a new trial is an acknowledgment of service purporting to have been signed by "Arthur L. Dasher, Atty. for Plaintiff." It follows the rule nisi, and appears to have been written originally in these words: "Due and legal service of the within motion and amended motion for new trial is hereby acknowledged, and copy and further service waived. Novem-

ber 23rd, 1904." Through the introductory words, "Due and legal," and also through the word "waived," a line is drawn, presumably with a view to striking these words. The result is to offend good English, but enough was preserved to show an acknowledgment of service of both the original motion for a new trial and the amendment thereto. Nothing to the contrary appearing, it is to be presumed that the service which the plaintiff's attorney acknowledged had been made upon him was such as the law directs; it is but fair to take him at his word that service of the motion for a new trial had been perfected. The Civil Code, § 5475, provides that "In all applications for a new trial the opposite party shall be served with a copy of the rule nisi, unless such copy is waived." The plaintiff's attorney evidently intended to waive nothing; but he was not entitled to a copy of either the original or the amended motion for a new trial, and if (as he acknowledged in writing was true) service thereof was made upon him, no further service was essential and there was no occasion for waiving anything. What he evidently wished to make apparent was, that whereas the rule nisi was granted on October 5, 1904, service was not perfected until the date of his acknowledgment of service, November 23, 1904, and he did not wish to commit himself to the proposition that the service was timely, and therefore "due and legal," or be understood as waiving his right to insist that service came too late. Counsel was mistaken in thinking that under the Civil Code, § 4324, his client was entitled to at least ten days notice in writing of the time and place of the hearing; for, as has already been stated, that section provides simply for cases where no order is passed in term for hearing a motion for a new trial in vacation, and where the trial judge, upon application of one of the parties, in vacation fixes a time and place for the hearing during vacation. Section 5487, providing for twenty days notice to the respondent when an application for a new trial is made after the adjournment of the court, relates only to what are known as "extraordinary" motions for a new trial. Section 5475, which refers to ordinary motions filed in accordance with the requirements of section 5484, and which provides for service of the rule nisi upon the respondent, does not fix any specified time within which such service shall be perfected. Service within a reasonable time is contemplated, and

if made in ample time before the hearing to afford the respondent a reasonable opportunity to get ready to meet the motion, the demands of the statute will be satisfied. It is good practice, however, for the judge to provide in his order within what time the movant shall perfect service upon the respondent, to the end that both parties may be ready on the day fixed for the hearing. When this is not done, and service is not made prior to the hearing, the motion for a new trial is subject to dismissal. *Smedley v. Williams*, 112 Ga. 114. In the present case the attorney for the respondent acknowledged service three days before the hearing, which had been set for November 26th. This apparently gave him ample time within which to prepare to resist the granting of the motion, and the record contains no suggestion to the contrary, nor did he insist upon the hearing that the time was too short. The case is therefore controlled by the decision of this court in *Martin v. Monroe*, 107 Ga. 830, in which case the respondent moved to dismiss the motion for a new trial, "because the acknowledgment of service was over ten days after the granting of the rule nisi and after the adjournment of the term." Dealing with this point, the court held that there was no merit in the complaint that the trial judge overruled the motion to dismiss, "the service having been actually made in ample time before the hearing, and there being no order limiting the time within which service should be made." The order passed in the present case made no provision whatever for service upon the respondent.

3. In this order November 26, 1904, was fixed as the date of the hearing, and leave was therein given the movant "to amend his motion and until the said day, and on said day, to amend and to perfect his brief of evidence in the case." The respondent in its motion to dismiss the motion for a new trial presented the objection that no brief of the evidence had been filed, nor any attempt to do so made as contemplated by the Civil Code, § 5484. Unless the order of the court relieved the movant of the necessity of filing a brief of the evidence in accordance with the terms of that section, the motion for a new trial was ripe for dismissal. *West v. Smith*, 90 Ga. 284; *Cotton v. Slaughter*, 69 Ga. 735; *Brantley v. Huss*, Ib. 748; *Brunswick Light Co. v. Gale*, 91 Ga. 813; *Central R. Co. v. Pool*, 95 Ga. 410; *Williams v. Central*

R., 77 Ga. 612; *Baker v. Johnson*, 99 Ga. 374; *Hyatt v. Cowan*, 115 Ga. 608. Leave to prepare and file a brief of the evidence on or before the hearing must be unequivocally granted, else the movant can not justify an omission to follow the practice prescribed in the section of the code last cited; and where the order relied on by him as authorizing a departure from this practice is ambiguous and was not intended by the trial judge to be understood as extending the time for filing a brief of the evidence, the movant is not in a position to excuse his failure to comply strictly with the terms of the statute. *Cohen v. Lester*, 103 Ga. 565; *Barnes v. Railroad Co.*, 105 Ga. 495; *Brown v. Richards*, 114 Ga. 318. But an order of court which prescribes other terms respecting the preparation and presentation for approval of a brief of evidence is to be given a reasonable construction, and be understood as not contemplating that the movant should file a brief of evidence during the term at which the trial was had. *R. & D. R. Co. v. Buice*, 88 Ga. 181; *Hightower v. Brazeal*, 101 Ga. 371; *Malsby v. Young*, 104 Ga. 204; *Johnson v. Grantham*, 110 Ga. 281; *Cross v. Coffin-Fletcher Packing Co.*, 123 Ga. 818. Thus, in *Hightower v. George*, 105 Ga. 549, it was held that: "Where in term time an order is passed directing that a motion for a new trial then pending be heard and determined at a day named in vacation, and time is given by the presiding judge until that date within which to perfect the brief of evidence and have the same approved, and where upon the day thus named a brief of evidence is presented to and approved by the judge, and he thereupon orders the same filed, a motion made at the hearing to dismiss the motion for a new trial, upon the ground that no brief of evidence has been filed as required by law, is properly overruled." This decision disposes of the objection, made in the present case, that a brief of the evidence had not been filed within the time prescribed by statute. The order was broad enough to include the privilege of filing the brief on the day set for the hearing; a brief of the evidence had been prepared and a copy of it had been delivered to counsel for respondent, and counsel for the movant stated to the court that he "expected then and there to have the motion as amended approved, and also the brief of the evidence." The court erred in not permitting the movant to perfect his motion by filing an approved brief of the evidence, as it was his

right to do under the terms of the order fixing the time and place of the hearing.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

MACON RAILWAY AND LIGHT COMPANY v. VINING.

123 770
125 360

1. A charge that it is the duty of a street-car company to select a reasonably safe place for landing passengers, wherever it may stop a car for that purpose, states a sound legal proposition, and is not open to the criticism that it impliedly instructs the jury that a failure to perform such duty would be negligence per se.
2. On the trial of an action against a railway company for personal injuries, it is error for the trial judge to instruct the jury that a given state of facts would be sufficient to establish negligence on the part of the defendant, these facts not being such as would in law, per se, constitute negligence. The fact that the Supreme Court in passing upon demurrers to the petition in the same case, when formerly under review, stated that certain acts or their omission would constitute negligence and render the defendant liable, does not make it proper for the trial judge to make such statement in charging the jury.
3. One of the charges excepted to was somewhat argumentative, and presented with too much stress plaintiff's contention of fact.

Argued June 29, — Decided August 4, 1905.

Action for damages. Before Judge Hodges. City court of Macon. December 2, 1904.

Dessau, Harris & Harris and Roland Ellis, for plaintiff in error. *Marion W. Harris and T. J. Cochran*, contra.

FISH, P. J. Mrs. Vining sued the Macon Railway and Light Company for damages, for personal injuries alleged to have been sustained by her while a passenger of the defendant company and by reason of its negligence. A verdict was found for the plaintiff, and the defendant excepts to the refusal of a new trial. The allegations of the plaintiff's petition are fully set forth in the report of the case when it was formerly before this court. 120 Ga. 511.

1. The court instructed the jury that it is the duty of a street-car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose. This charge was excepted to, because it placed a duty upon the company which is not imposed by any statute or ordinance, and because it

in effect instructed the jury that a failure to perform such duty would be negligence per se. The exceptions were not well taken. The charge was in the language of the opinion rendered in this case in 120 Ga. 511, and merely stated a correct legal proposition applicable to the case. It left the question of fact, as to whether the landing was reasonably safe or not, entirely with the jury. *Western & Atlantic R. Co. v. Burnham*, 123 Ga. 28; *Atlanta & West Point R. Co. v. Hudson*, Id. 108.

2. Other instructions excepted to were: "If, however, a passenger selects a place which is reasonably safe, and the car has stopped, and on account of the darkness the passenger can not determine whether the car has stopped at the place designated, and the passenger exercises ordinary care and diligence, and the conductor in charge of the car permits the passenger to attempt to alight without informing him that the place selected has not been reached and also without informing him as to any dangers that might exist incident to alighting at the place at which the car had actually stopped, then the company would be liable; provided, the passenger is injured in alighting as a consequence of a danger of which he is not aware and which on account of the darkness was not apparent to him at the time he attempted to alight by the exercise of ordinary care and diligence, or if after having stepped from the car the passenger attempted to proceed along what would have been a safe way in the event the car had stopped at the place which he, the passenger, selected." "If the passenger selects a place which is reasonably safe, and the car is stopped, and the passenger in the exercise of ordinary care and diligence can not determine whether the car has stopped at the place designated by him, and the conductor permits the passenger to alight, without informing him that the place selected has not been reached, and without informing him of the place where the car was actually stopped, and such place was not actually safe for landing, and the passenger is injured and damaged, without fault or negligence on his part, by reason of such failure on the part of the conductor, then I charge you that the company would be liable to such passenger for injuries and damage occasioned by the negligence of the company's servants." One of the exceptions to these charges was that the court therein instructed the jury as to what facts or acts would constitute negligence on the

part of the company's servants. Obviously this is a just criticism. *West End Ry. Co. v. Mozely*, 79 Ga. 463. The question as to what acts do or do not constitute negligence is exclusively for determination by the jury, in the absence of a statute or valid municipal ordinance declaring a particular act to be negligence. *Atlanta & West Point R. Co. v. Hudson*, supra, and cit. "The trial judge should not tell the jury what acts would constitute negligence and what would not, but should instruct them as to the proper measure of diligence and leave them to determine, in view of all the evidence bearing on the subject as to the time, place, circumstances, and happenings, and the whole transaction as disclosed by the evidence, as to whether there was or was not a want of due care." Ib. That the Supreme Court, in passing upon a demurrer to the petition in the present case when formerly under review, used expressions contained in the instructions now under consideration, did not of itself make it proper for the trial judge to use such language. "There are many things said by [the Supreme Court] both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury." *Savannah Ry. Co. v. Evans*, 115 Ga. 315; *Atlanta & West Point R. Co. v. Hudson*, supra. The error in the charges last above quoted requires a reversal of the judgment refusing a new trial.

3. The tenth ground of the motion for a new trial complains of a lengthy extract from the judge's charge, on the grounds that it was argumentative, and presented with too much stress and detail plaintiff's contention of fact. We think this charge open to the criticism made upon it, but deem it unnecessary to say more upon the subject, as upon the next trial the judge in his instructions will no doubt avoid such objectionable features. There are other assignments of error not necessary to be dealt with, as they relate to matters not at all likely to arise on another trial.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

MACON RAILWAY AND LIGHT COMPANY v.

MASON, and *vice versa*.

123	773
126	61
123	773
129	72

1. In an action to recover damages for a personal injury, it is error requiring a new trial for the court to instruct the jury as to the right of a plaintiff to recover punitive damages where the tort complained of is accompanied by aggravating circumstances, when the evidence does not warrant a charge on this subject.
2. In order for the jury to assess punitive damages in such an action, it is not necessary that they should be claimed *eo nomine*, but it is enough that the facts alleged and proved be such as to warrant the assessment.
3. It is competent for a party to account for the absence of an eye-witness to the occurrence under investigation, that the jury may not draw any unfavorable inferences from the failure to produce and examine the witness.
4. Where the person injured is a dentist, testimony as to his capacity and efficiency in his chosen profession prior to his injury is relevant, as bearing directly upon the measure of damages.
5. One who is a graduate of a college where anatomy and physiology are taught, and who is engaged in the practice of osteopathy and has gained experience in the treatment of nervous disorders, may be examined as an expert witness, upon these facts being made to appear, notwithstanding he is not a licensed physician and does not administer drugs to his patients.
6. That the jury may clearly understand their duty with respect to reducing to its present cash value the gross amount which they may find to fairly represent the loss in earning capacity which the injured party has sustained, the court, in charging upon this subject, should make choice of language which is not calculated to confuse the jury because of inaccuracy of expression.
7. The wife of the injured party is not, because of the marital relation existing between them, and the policy of the law to preserve inviolate confidential communications between husband and wife, incompetent to testify as to the nature of the injury received by him and its effect upon his physical condition, when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife.
8. The wife may testify to symptoms which she observed, indicating that her husband suffered from headache, but should not be permitted to generalize or state any bare conclusion based upon her observation of others who had headache, she not professing to be an expert.

Argued June 30, — Decided August 4, 1905.

Action for damages. Before Judge Hodges. City court of Macon. January 23, 1905.

The plaintiff below, J. M. Mason, instituted a suit for damages against the Macon Railway and Light Company, and recovered the sum of \$2,500. The allegations of his petition were substantially as follows: On September 6, 1903, he boarded one of

the electric street-cars owned and operated by the defendant company. Two cars were coupled together, the one in front being a motor car and the other being what is commonly known as a "trailer." There were no vacant seats upon either, so he got upon the front platform of the "trailer." The conductor came to him and collected his fare, offering no objection to his riding on the platform. Within a few minutes, and while plaintiff was standing with his back towards the car ahead, the conductor reached over from the rear platform of that car for the purpose of applying the brake on the front platform of the "trailer," and in swinging the brake handle around struck the plaintiff a violent blow with it in the back and upon his spinal column. The conductor gave to him no warning or intimation of an intention to apply the brakes, although he was standing in a position where he would be injured if given no opportunity to move out of the way of the brake handle. He protested to the conductor "against being used in any such way," and the conductor "responded to [him] in an insulting and uncalled-for manner, in the full hearing of the other passengers on said car, greatly mortifying [him] and wounding his feelings and sensibilities." The physical injuries received are of a permanent character; the plaintiff is a professional dentist, and his ability to labor at his profession has been greatly impaired. The negligence charged was, (1) in undertaking to apply the brakes save from the platform of the "trailer," and (2) in giving the plaintiff no warning that an attempt would be made by the conductor to apply the brakes while standing upon the rear platform of the car ahead. The nature of the injuries sustained and their effect upon the earning capacity of the plaintiff were also alleged in detail, and damages to the amount of \$15,000 were asked. To the petition the defendant company demurred both generally and specially. The court overruled the demurrer, save as to one of the plaintiff's allegations to which special objection was raised, and exception was taken to this ruling upon the demurrer. The railway company also excepted to the refusal of the court to grant its motion for a new trial. By cross-bill of exceptions the plaintiff complains of the rejection by the court of certain testimony which he offered on the trial. Upon the argument here, counsel for the company did not insist on the assignment of error touching the disposition

made of its demurrer, and announced that the 7th and 8th grounds of the amendment to the motion for a new trial were abandoned.

Dessau, Harris & Harris and *Roland Ellis*, for the Railway Company.

B. M. Davis, T. S. Felder, and J. F. Urquhart, contra.

EVANS, J. (After stating the facts.) 1. Complaint is made that the verdict of the jury was excessive, and it is further urged in behalf of the company that this result was doubtless brought about by the grave error of the presiding judge in charging the jury as to the right of a plaintiff to recover punitive damages where there are aggravating circumstances attending the commission of a tort upon him. This charge, counsel insist, was unwarranted by the evidence; and in this view we concur. The testimony discloses that the conductor, while perhaps inattentive and inexcusably careless, committed no wanton act which resulted in injury to the plaintiff or showed anything more than a negligent disregard for his safety. While the cars were descending a steep grade, a passenger indicated his desire to disembark at the next stopping point, and the conductor signaled the motorman to stop. The motorman, realizing he could not stop the cars at that point unless the brake on the "trailer" was applied, rang his gong as a signal to the conductor to put on the brake of the rear car. As to whether the conductor, before attempting to do so, gave warning to the plaintiff and others of his intention to put on the brake, the testimony was conflicting; but there was no dispute as to his reaching for the brake from his station on the rear platform of the motor car and unintentionally striking the plaintiff while swinging the brake handle around in an effort to promptly apply the brake. There were no aggravating circumstances attending the infliction of the injury upon him. The plaintiff testified, that he immediately turned towards the conductor and said, "What do you mean by treating a gentleman that way?" and the latter, "in an insulting manner," replied, "You had no business standing out there;" whereupon the plaintiff said, "If you told me that when I gave you my fare, I would have gotten on another car," and the conductor replied, "You had no business standing up there." The plaintiff then said, "I did not know I was violating any rule of the company." To this remark the

conductor made no response, and nothing else occurred. The plaintiff further testified: "I spoke very loudly; I was a little angry, I will admit; and he spoke just about the same way. The other passengers could hear what I said if they had ears; they ought to have heard it in the middle or the back of the car, and I suppose they did. It mortified me very much; a great many ladies sitting there, and other things, and it appeared to me the most of those people did not know; it looked like the conductor was trying to put me off, as if I had not paid my fare." It thus appears that the plaintiff, with some show of passion, undertook to call the conductor to account for what he had unintentionally done, and that the conductor replied to him, in a manner which he regarded as insulting, that he was himself to blame, for the reason that he should not have been in the way. What the conductor said, even though he may have spoken discourteously, did not amount to an insult or to such abusive treatment of a passenger as would render the company liable in damages. If the plaintiff was insulted, he was supersensitive; if he suffered mortification because he feared the passengers did not understand the situation, there were no grounds for his fears in this regard, for nothing was said or done to lead his fellow-passengers into the mistaken belief that the conductor was trying to put him off because he had not paid his fare. Had the manner of the plaintiff been more gentle it is not improbable that the conductor would have been civil, if not equally courteous. If, as seems to be true, it "was the plaintiff's fault that the conductor was out of tune," the former can not complain of disrespectful treatment by the latter. *Peavy v. Railroad Co.*, 81 Ga. 488. A conductor has been judicially recognized as human. *City Electric Ry. Co. v. Shropshire*, 101 Ga. 36. And this court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employee of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company can not be held accountable for improper conduct on the part of its servant. *Central Ry. Co. v. Motes*, 117 Ga. 923, 933.

2. To so much of the plaintiff's testimony as related to the mortification he suffered from what he conceived to be disrespect-

ful conduct on the part of the conductor, counsel for the company objected on the grounds, (1) that "the declaration did not allow a recovery for wounded feelings," and (2) that "the case was not one for the recovery of damages for wounded feelings, but the declaration is projected on the idea of recovery for physical injury only." The testimony was not, for the reasons assigned, inadmissible. In his petition the plaintiff specifically alleged that when he protested against the careless way in which the conductor had acted to his injury, the conductor, in the hearing of the other passengers on the car, responded in an insulting and uncalled-for manner, greatly mortifying him and wounding his feelings and sensibilities. For the wrongs he alleged he had suffered, he claimed to be entitled to recover a specified amount. "In order for the jury to assess punitive damages in an action for a tort, it is not necessary that they should be claimed *eo nomine* in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment." *S., F. & W. Ry. Co. v. Holland*, 82 Ga. 258.

3. Objection was also raised to the plaintiff being allowed to testify that a gentleman who was shown to have been an eye-witness to the occurrence under investigation and who had been in attendance on the court, but was not then present, had left without the plaintiff's consent. That the jury might not draw any unfavorable inferences because of the failure of the plaintiff to introduce this absent witness, it was competent for the plaintiff to explain that he was not responsible for his absence. *R. & D. R. Co. v. Garner*, 91 Ga. 27.

4. The court very properly, notwithstanding the contention of the defendant that the plaintiff's capacity and expertness as a dentist were not in issue, admitted testimony to the effect that he was capable and expert in his chosen profession prior to his injury.

5. A witness introduced in behalf of the plaintiff to show to what extent he was injured testified that he (the witness) was an osteopath physician, but did not prescribe drugs or practice medicine as did the ordinary practitioner, and was not licensed to do so. It appeared that he had taken a course of study in osteopathy at the Southern School of Franklin, Ky., and had graduated from that college after attending four terms of school

of five months each. He had taken a ten-months course in physiology, and had read certain named text-books on that subject, and on anatomy, pathology, and the practice of medicine. He had been in actual practice of his calling since the first of February of the year prior to the trial, and had gained considerable experience in the treatment of nervous disorders. Counsel for the company nevertheless objected to the witness being examined as an expert touching the nature and probable duration of the injuries sustained by the plaintiff; but the court held that the witness was competent to testify. Had he been licensed under the laws of this State to practice medicine, it is clear that he would have been competent to testify as an expert witness, upon the fact being made to appear that he was a licensed physician. *Von Pollnitz v. State*, 92 Ga. 16. Not being a licensed practitioner, it was necessary to lay the proper foundation showing him to be an expert as to the subjects on which he proposed to express his opinion. We think the necessary foundation was laid. "The opinions of experts on any question of science, skill, trade, or like questions, are always admissible." Civil Code, § 5287. "An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons." 12 Am. & Eng. Enc. L. (2d ed.) 424. "This knowledge may be derived from experience or from study and direct mental application." Id. 425. "Strictly speaking, an 'expert' in any science, art, or trade, is one who by practice or observation has become experienced therein." Rogers on Expert Testimony (2d ed.) 2. But generally nothing more is required, to entitle one to give testimony as an expert, than that he has been educated in the particular trade or profession. Id. 4; 1 Gr. Ev. § 440. Knowledge gained by consistent and close study of medical works renders one competent to testify as an expert concerning the matters of which he has thus learned. *White v. Clements*, 39 Ga. 232; *Mayor &c. of Jackson v. Boone*, 93 Ga. 662. It is not essential that he should be actively engaged in the practice of medicine. *Everett v. State*, 62 Ga. 71; 12 Am. & Eng. Enc. L. (2d ed.) 426. Nor is it essential that one who really has a scientific education on the subject should be a graduate of "any medical college, or have a license to practice from any medical board." Id. 100 (1). What he knows is what

really qualifies him to express an opinion as an expert, and a diploma or license is important only as furnishing satisfactory evidence of his competency as a witness. Accordingly, a "person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues." *Id.* 105 (9). The plaintiff showed that the witness introduced in his behalf pursued a calling which required a special study of anatomy and physiology, and his testimony indicates that he had a practical as well as a theoretical knowledge concerning the subjects as to which he undertook to impart information and to express the opinion of an expert.

6. The court in general terms instructed the jury that in the event they found in favor of the plaintiff, it would be their duty to estimate "the present value of the amount he claims he has lost by reason of his diminution in capacity to labor by reason of the injury," and that they might determine what would be a present cash equivalent from their own knowledge of arithmetic and mathematics, or from a paper which had been introduced in evidence and which showed the expectancy of one 49 years of age, and other data, taken from the mortality and annuity tables published in the 70th *Ga.*, "or from other evidence in the case." The instruction given to the jury upon this subject is criticised as being confusing and as laying down an incorrect method to be pursued by the jury, and "because it deprived the jury of the right to use their general knowledge upon the computation of damages of this character." The general tenor of the charge was right, though the language employed by the court was more or less involved and not altogether accurate. The gross amount which the jury might find the plaintiff would lose because of his diminished capacity to labor, as disclosed by the evidence, and not "the amount which he claims he has lost," was the sum to be reduced to present value. This and other minor inaccuracies of expression render the charge less clear than it should be. Otherwise it is not open to the criticisms made upon it. If more specific instructions were desired, an appropriate request to charge should have been presented. *Southern Ry. Co. v. O'Bryan*, 119 *Ga.* 148 (4), 151.

7. The cross-bill of exceptions is mainly devoted to a number

of assignments of error upon the ruling of the court that the wife of the plaintiff, because of the marital relation existing between them, and the policy of the law to preserve inviolate the confidential communications between husband and wife, was an incompetent witness to testify as to the nature of the injury sustained by her husband and its effect upon his health, etc., etc. She was not permitted to even answer the question: "Did you, at any time, look at and examine the back of Dr. Mason?" nor to give evidence that "Dr. Mason's shoulder was swollen." We are of the opinion that none of the testimony excluded came within the contemplation of the section of our code bearing on the subject of confidential communications. Civil Code, § 5198. In *Stanford v. Murphy*, 63 Ga. 411 (5), the rule was correctly stated to be that "The wife is an incompetent witness for or against the husband in regard to any information derived from his confidence in her." It can scarcely be said that Dr. Mason was seeking to make any secret of his injury, its location, nature, or extent. He submitted himself to examination by not only his own, but the company's physicians. Some one had to minister to his wants and give him proper nursing and attention. His wife could minister to him in the capacity of nurse or attendant without rendering herself incompetent to testify to the knowledge she gained concerning his physical condition. There is nothing to indicate that she derived such knowledge from any special confidence which Dr. Mason reposed in her as his wife, or that there was any occasion for his making to her, as such, any confidential communication concerning the matter. Of course she could not properly be permitted to testify to any complaints of pain and suffering which he may have made to her; but testimony as to such complaints would be inadmissible, not because of the marital relation, but simply because it would be mere hearsay. *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 467. As to facts within her knowledge concerning the effects upon her husband produced by the blow he received, she stood upon the same footing of any other competent witness, not having in point of fact gained her information through any communication from her husband which was intended to be private and confidential.

8. Upon being asked what external evidences of pain Dr. Mason gave of his sufferings, Mrs. Mason answered: "Swollen

veins on his forehead, red eyes, and every symptom of a violent headache. I observed swollen veins on his forehead, and red eyes, and red face, and every symptom I have ever noticed with any one who had headache." On motion of counsel for the company, the court ruled out so much of the answer as related to what she had "ever noticed with any one who had headache." The ruling was eminently proper. The witness was competent to state what symptoms she observed, but not to generalize or to state her conclusion that Dr. Mason had every symptom which she had ever noticed in others who suffered from headache. The witness did not profess to be an expert.

The foregoing discussion disposes of all the questions presented by either the main or the cross-bill of exceptions, except a complaint by the defendant company that the court refused to declare a mistrial because of improper remarks made by counsel for the plaintiff while arguing the case before the jury. As there must be another trial, we do not feel called on to pass upon this complaint. The court ruled that the remarks of counsel were not authorized by the evidence, and we have no reason to apprehend that the propriety of remarks of this nature will become the subject-matter of controversy at the next hearing.

Judgment on both the main and the cross-bill of exceptions reversed. All the Justices concur, except Simmons, C. J., absent.

REED, trustee, v. HOLBROOK.

123	781
129	610

Where personalty duly exempted was used in connection with the labor of the applicant and his family in the making of crops on land, purchased by him subsequently to the exemption, title to which was taken in his own name, and the proceeds of the sale of the crops were applied to the payment of the purchase-money of the land; such land was subject to a debt afterwards contracted by the applicant for provisions and supplies for himself and family, the creditor having no notice as to how the land had been paid for, and having extended credit knowing that the legal title to the land was in the applicant and upon the belief, in good faith, that he had an absolute and unencumbered title to the same. The record of the exemption was not of itself sufficient to put the creditor on notice of the homestead character of the land.

Submitted July 1, — Decided August 4, 1905.

Levy and claim. Before Judge Holden. Hart superior court.
December 22, 1904.

J. H. Skelton, O. C. Brown, and W. L. Hodges, for plaintiff in error. A. G. & Julian McCurry, contra.

FISH, P. J. Holbrook had an execution against Aaron Reed levied upon certain land claimed as homestead property by Reed as trustee for his wife. Upon the trial the claimant admitted being in possession of the land at the time of the levy, and assumed the burden of proof, offering as evidence, to support his claim, the record of the proceedings exempting certain personal property including three horses, several head of cattle, farm supplies and implements, and testimony to the effect that the land levied upon had been bought from one T. T. Holbrook, as agent, etc., with the proceeds of the sales of crops grown on the land and made with his labor and that of his wife and children, the beneficiaries of the exemption, and with the use of the exempted property. The plaintiff testified, that he had no knowledge that the land had been purchased with the proceeds of the sale of such crops, but on the contrary believed the title thereto to be absolutely in Reed individually, as he, the plaintiff, had held the deed conveying the property from T. T. Holbrook into Reed as collateral security for certain indebtedness due him by Reed; that for a number of years he had sold Reed provisions and supplies; that the *fi. fa.* in this case was based upon a judgment against Reed for provisions, and that he "extended him the credit on the faith of this deed and that title to the land was in Aaron Reed." This deed, which was to Reed individually and which bore no mark indicating that its consideration was in part the proceeds of exempted property, was also placed in evidence. The court directed a verdict finding the land subject to the levy. The claimant made a motion for a new trial, upon the grounds that the verdict was contrary to law and the evidence, and because the court erred in directing the verdict. The motion was overruled, and the claimant excepted.

When this case was here before (113 *Ga.* 1168), all the questions which are now presented were decided, except (1) as to whether or not the exemption, which was set apart prior to the time credit was extended to Reed by Holbrook, was constructive notice to the latter that the beneficiaries of the exemption had an interest in the land; and (2) if the record of the exemption was not such notice, whether the lien of the plaintiff's judgment

should be enforced against the secret equities of the beneficiaries under the exemption. In the case of *Walden v. Brantley*, 116 Ga. 298, where Walden had set apart to him as the head of a family a homestead consisting of realty and personalty, and subsequently sold the real estate and some of the personalty under an order of court and reinvested the proceeds in a house and lot, and sometime thereafter exchanged that house and lot for another, it was held that these facts did not charge a subsequent creditor, who was also a mortgagee, of Walden with notice of the homestead character of the property, and that the property, as against the execution of such creditor, was not exempt. If the head of a family desires to sell or otherwise trade with exempted property, he should do so in the way the law prescribes, and when he disregards the formal requisites of the law he does so at his peril. *Pate v. Oglethorpe Co.*, 54 Ga. 515. In our opinion, the plaintiff in the case now under consideration was not, under the evidence submitted, chargeable with notice of the homestead character of the property levied upon.

The record of the exemption proceedings not being constructive notice to the plaintiff that the equitable title to the land was in the beneficiaries of the exemption, was the property subject to the plaintiff's levy, he having given Reed credit upon the belief that he owned the land unencumbered? We think it was. There being no notice to the plaintiff, actual or constructive, of the real character of this property, the interest of the beneficiaries under the exemption was no more than a secret equity, and can not be enforced against the claim of a bona fide creditor who gave credit on the faith that the property was Reed's and unencumbered. This is a principle which has been long recognized by this court, it having been held in the case of *Zimmer v. Dansby*, 56 Ga. 79, that "if the legal title to land be in the husband and he holds the possession thereof under such title, and the title and possession so remain until a creditor, who gave credit on the faith that the property was the husband's, without notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land." The evidence being undisputed that credit was extended to Reed on the faith that the property

to which he held the legal title was his own and unencumbered, and that the plaintiff had no notice of the equities of the beneficiaries therein, the court did not err in directing the verdict finding the property subject.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

HOUSE v. OLIVER *et al.*

1. While a city court has no jurisdiction to grant affirmative equitable relief, it may entertain jurisdiction of an equitable plea purely defensive in its nature, which upon being sustained would result simply in a general verdict in favor of the defendant.
2. A verdict and judgment in favor of the defendant in a suit on a note as effectually cancels the note as would a decree in equity; and a suit thereon in a city court will not be enjoined in order that the superior court as a court of equity may decree a cancellation of the note.
3. There was no error in refusing to grant an injunction.

Argued July 1, — Decided August 4, 1905.

Petition for injunction. Before Judge Kimsey. Hall superior court. April 12, 1905.

The record discloses the following state of facts: House and Oliver were partners. They agreed upon a dissolution and settlement of the partnership affairs. Under the agreement certain assets were turned over to Oliver, and House delivered to him his note for \$850. Thereafter House brought an equitable petition against Oliver and Martin (the latter having become the owner of the \$850 note), in which it was alleged that a fraud had been perpetrated upon House in the settlement of the partnership affairs, as a result of which Oliver had received more than he was entitled to, such fraud consisting in misrepresentations as to the amount of the debts due by the partnership, etc. It was alleged that upon an equitable and fair settlement of the partnership affairs Oliver was not entitled to the note for \$850, nor to any of the assets delivered to him, and hence that the note was entirely without consideration; and that Martin was not an innocent purchaser without notice. The prayers were, for a full and complete accounting, that the \$850 note be declared void and canceled, and that Oliver be required to return the other assets which had been turned over to him. The case was referred to an auditor, and

while it was pending on exceptions to the auditor's report, House, with the consent of Oliver and Martin, dismissed the case. Subsequently to the dismissal Martin brought a suit, in the city court of Hall county, against House on the \$850 note, and Oliver, in the same court, brought a suit against House for the amount which he claimed House had wrongfully collected of the assets turned over to him in the partnership settlement. The present petition was brought by House against Oliver and Martin, attacking the partnership settlement upon the grounds on which it was assailed in the original suit, and also upon other grounds; and the prayers were, for an accounting between the parties, that the contract of dissolution be canceled, that Martin be decreed not to be an innocent holder of the note and the note be delivered up to be canceled, that if this can not be done, House recover of Oliver the full amount of the principal, interest and costs that he may be required to pay to Martin, and that he have judgment against Oliver for the value of the assets of the partnership turned over to him in the settlement, that he be restrained from collecting any of the assets that remain uncollected, and that the suits in the city court be enjoined. Oliver answered, denying all of the allegations of fraud, and set up that the settlement was fair in every way. The answer of Martin set up that he was an innocent purchaser of the note for value and without notice. The evidence as to the details of the settlement was conflicting. The judge refused to grant the injunction restraining the suits in the city court, and House excepted.

Dean & Hobbs, for plaintiff. *H. H. Perry, Parks & Gaillard*, and *F. M. Johnson*, for defendants.

COBB, J. Merely that a defense involves the application of equitable principles does not deprive a city court of jurisdiction to entertain the same. A plea which, though setting up a defense which is equitable in its nature, is purely defensive and does not involve the exercise of any of the extraordinary powers of a court of equity, may be filed in a city court. But when the plea calls for the exercise of those powers which have sometimes been described as "the larger powers" of the court of chancery, such as cancellation, reformation, and the like, a city court can not entertain jurisdiction. In the case of *National Bank v. Carlton*, 96 Ga. 469, a suit in a city court was enjoined upon

the ground that the plaintiff was entitled, under her allegations, to a cancellation of a deed, and that this relief could not be granted to her by the city court. In *English v. Thorn*, 96 Ga. 557, a suit in a city court was enjoined upon the ground that the plaintiff was entitled, under the allegations of the petition, to a reformation of the contract, and that this was beyond the power of the city court. In *Ragan v. Standard Scale Co.*, 123 Ga. 14, a claimant sought to mold a decree enforcing the equitable right of subrogation, which involved the revival of a canceled mortgage; and it was held that such relief was beyond the power of a city court to grant. The cases cited are those upon which the plaintiff in error relies for a reversal of the judgment refusing to grant the injunction; but the allegations of the petition do not bring the case within the principle of any of those decisions. There is a prayer for the cancellation of the dissolution agreement of the partnership; but when the allegations of the petition are taken as a whole, it appears that the plaintiff does not desire that the dissolution be set aside and the partnership reinstated, but that the relief sought is simply an accounting of the partnership affairs according to the truth and justice of the case. Nor is it necessary, even if it had been desired, that the agreement of dissolution should be set aside. If the \$850 note was obtained by fraud, or if other assets reached the possession of Oliver for a similar reason, we do not see why House can not avail himself of these facts by a purely defensive plea in the city court. If the note was without consideration, and of such a character that a plea of no consideration would be available as a defense to it, this defense can be pleaded in the city court, and any evidence which would be admissible in any court to establish this fact would be admissible there. If House had a right to collect from debtors to the firm those claims which had been turned over to Oliver, a defensive plea setting up this right would be within the jurisdiction of the city court, and he could be as fully protected in that court under such a plea as in any other court. House claims simply that Oliver has perpetrated a fraud upon him, that therefore he had no right to collect the \$850 note, and that House had a right to collect other claims which were turned over to Oliver. These matters can be fully pleaded; and if House establishes his defense, the city court can render a judgment in

his favor in each of the cases in which he is sued. If Martin is not an innocent purchaser, his suit may be defeated by any defense of which House could avail himself if the note had not been transferred. But it is said that there is a prayer for a cancellation of the \$850 note, and that the city court can not decree a cancellation of the note. If House has a complete legal or equitable defense to the note, and can establish this defense in the city court, a judgment in his favor will be rendered, and no decree cancelling the note will be necessary for his protection. In the *Carlton* case, above referred to, the prayer was, not for a cancellation of the note, but for a cancellation of the deed given to secure the note, and for other equitable relief in connection with the transaction. Where there is a single transaction, represented by a single note, a judgment by any court of competent jurisdiction in favor of the defendant on any plea which has the effect to discharge him from liability on the note as completely cancels the note as would a decree in equity. If this were not true, then every defendant sued in any court upon a written promise to pay could transfer the case to the superior court by simply setting up in his petition what would have been a proper plea in the case and adding a prayer for cancellation. If the transaction involved a series of notes, all subject to the same defense, and only one was sued, and the petition sought to enjoin this suit and to cancel all of the notes connected with the transaction, thus avoiding a multiplicity of suits, a different question would arise. We do not think there was any error in refusing to grant the injunction restraining the prosecution of the suits in the city court.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

REID, receiver, *v.* DEJARNETTE. REID, receiver, *v.* YOUNG.

REID, receiver, *v.* LAWSON.

123	787
125	716
123	787
1127	114
1127	115

A provision in a charter granted prior to the act of 1893 (Acts 1893, p. 70, Civil Code, §§ 1903-1911), to the promoters of a banking enterprise, to the effect that "each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his unpaid subscription to the capital stock of the corporation, and for an additional amount equal to his subscription," is, in view of the policy then adopted by our

General Assembly, of providing in each particular instance under what circumstances and to what extent the owners of stock in such institutions may be held liable for corporate debts, to be understood as imposing individual liability upon such stockholders only as became such by subscribing to the capital stock, and not upon shareholders who by way of succession from the original stockholders became owners of stock.

Argued July 3, — Decided August 4, 1905.

Complaint. Before Judge Lewis. Putnam superior court. September 20, 1904.

The Putnam County Banking Company became financially embarrassed in the latter part of the year 1903, and, at the instance of one of its creditors, a receiver was appointed to take charge of its affairs and collect all debts due to it, as well as to institute legal proceedings against its stockholders, to enforce, for the benefit of its creditors, the statutory liability imposed by the charter of the company upon subscribers to its capital stock. In March of the following year, the receiver, A. S. Reid, brought an action against J. B. DeJarnette for \$600, alleging that on the date of the failure of the Putnam County Banking Company, and at the time of the creation of its outstanding indebtedness to the creditors for whose benefit the suit was instituted, he was the owner of twelve shares of the capital stock of that company, of the par value of \$50 each, and was therefore under a statutory liability to pay to the plaintiff, as receiver, the amount sued for, to be applied to the discharge of the company's indebtedness. The defendant filed a demurrer to the petition, one of the grounds of which was that no right to recover against the defendant was shown, for the reason that it was not alleged that he was at any time a subscriber to the capital stock of the bank, or what was the amount of his stock subscription, "but only that he owned at the time certain debts were contracted by the bank, and at the time of the failure thereof, 12 shares of the capital stock; which allegation, if true, would not, under the law, make him liable in any amount for the debts of the bank." The court sustained this ground of the demurrer and dismissed the action. A like disposition was made by the court of another action which had been brought by the receiver against Robert Young, to recover \$1,150, who the plaintiff alleged was the holder of twenty-three shares of the capital stock of the bank on the day of its collapse and during the period within which its outstanding indebtedness had been con-

tracted. The case was dismissed on motion of the defendant's counsel, on the ground that the petition set forth no cause of action. Still another suit, based upon similar allegations of fact, was brought by the receiver against Thomas G. Lawson, as the owner of 137 shares of the capital stock of the defunct bank. He filed an answer in which he set up the special plea that he was not liable to the plaintiff, as receiver, for the amount sued for, or for any other amount, "on account of his being a stockholder in said Putnam County Banking Company, as he was never a subscriber to the stock of the said Putnam County Banking Company, and all the stock he ever owned in said bank was transferred to him by persons who had subscribed for the same and had paid up the full amounts of their subscriptions." The plaintiff moved to strike this special plea; on the ground that it set forth no legal defense. The court overruled this motion, and the case proceeded to a trial on the merits. After the close of the evidence, the court instructed the jury to return a verdict in favor of the defendant, he having fully established his defense that he had never been a subscriber to any of the stock issued by the bank, but had purchased the stock held by him from other persons who had subscribed for the same and who had paid in full their stock subscriptions. The three cases were brought to this court for review by separate bills of exceptions sued out by the receiver, but were argued together, as the fate of each depends upon the determination of one and the same question of law.

Joseph H. Hall, for plaintiff. *Turner & Adams, Thomas G. Lawson, W. B. Wingfield*, and *Hall & Wimberly*, for defendants.

EVANS, J. (After stating the facts.) The Putnam County Banking Company was organized under a special act of incorporation, approved December 24, 1888. Acts of 1888, p. 89. It provided that "each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his or her unpaid subscription to the capital stock of the corporation, and for an additional amount equal to his subscription." The question presented for determination is: Was it the purpose of the General Assembly to impose this individual liability upon each and every person who might become a shareholder of the corporation, by subscribing to its capital stock or by purchase of shares issued to another, or otherwise succeeding to the holdings

of a stockholder who had ceased to be a member of the corporation; or was the legislative intent to fix the statutory liability upon such stockholders only as became such by subscribing to the capital stock? The term "stockholder" is not synonymous with that of "subscriber;" each has a distinct, definite, technical meaning; the latter is employed to denote one who becomes bound by a subscription to the capital stock of a corporation. It is to be presumed that the members of the General Assembly knew what was an "unpaid subscription to the capital stock" of a corporation, when they declared that each stockholder could be called on by creditors to pay, not only his "unpaid subscription to the capital stock of the corporation," but also an "additional amount equal to his subscription." If effect be given to the letter of the act, then the liability imposed was upon those who became stockholders through their voluntary act in subscribing to the capital stock of the banking company and assuming responsibility for the payment of its debts, not only to the extent of their respective stock subscriptions, but for double the amount thereof. The promoters of the enterprise asked for a charter, and it was granted to them upon the terms imposed in the act of incorporation. Upon these terms, and upon these terms only, could the enterprise be launched; the promoters and their associates, by acceptance of the charter, assumed the liability imposed upon them, and the public was given the assurance that they pledged themselves, if the fruition of their hopes to make the enterprise a successful one was not attained, to pay the debts of the banking company out of their own pockets, at least to the extent of putting into the proposed venture twice the amount of the stock subscriptions. The corporation itself was made primarily liable for the payment of its debts; those who subscribed to its capital stock were called on by the General Assembly to be its backers, its guarantors. The argument is advanced by counsel for the plaintiff in error that unless all stockholders (however they may have acquired their holdings) be held liable for the debts of the corporation, its creditors may not be able to collect their demands against it, since many if not all of the subscribers to its capital stock may now be dead, and such estates as they left fully administered. Conceding that such may be the case, we do not feel justified in so stretching the words used in the act

of incorporation as to bring within its operation all stockholders of the bank, whether they became shareholders by subscribing to its capital stock, or by way of succession from those who originally became bound to pay double the amount of their stock subscriptions, if necessity so to do should ever arise. We can not assume that the General Assembly contemplated that those who accepted the charter and organized under it could relieve themselves of the liability they voluntarily assumed by subsequently transferring their stock to others who might, or might not, be solvent and able to respond to the demands of debtors of the corporation. Nor does the act of incorporation provide any scheme whereby this liability might be shifted upon stockholders who purchased stock upon the faith that the act was to be understood as meaning neither more nor less than was said; nor is there any suggestion in the act of a compounding of liability, so that a creditor could treat each successive shareholder as an additional guarantor and, at his election, call upon either past or present stockholders for payment of his demand, or enforce satisfaction from all as one collective body answering to the description of "stockholders." We try to construe, not to legislate. No good reason has been advanced why the words used in the statute under construction should not be given their usual signification and the conclusion reached, that, while an individual liability was imposed upon each of the original shareholders, no provision was made for any further protection of creditors in the event the affairs of the bank might eventually be conducted by persons who succeeded to the rights of the subscribers to its capital stock and in this manner became stockholders.

An examination of the various charters granted to banking institutions prior to, at nearly the same time as, and subsequently to the passage of the special act incorporating the Putnam County Banking company, satisfies us that the General Assembly had no settled policy with regard to the terms upon which such charters should be granted, or any formulated scheme looking to the protection of creditors of this class of institutions. The reported cases which involved a construction of acts imposing an individual liability upon holders of stock in banks bear out this statement, so far as early legislation is concerned. See *Lane v. Morris*, 8 Ga. 468, 10 Ga. 162, 16 Ga. 217; *Thornton v.*

Lane, 11 Ga. 459; *Neal v. Moultrie*, 12 Ga. 104; *Moultrie v. Smiley*, 16 Ga. 289; *Robinson v. Lane*, 19 Ga. 337; *Robinson v. Beall*, 26 Ga. 17. In 1880 the General Assembly passed an act incorporating the Commercial Bank of Savannah, and the only liability imposed upon its stockholders was for unpaid stock subscriptions. Acts of 1880-1, p. 229. In the following year a charter was granted to another banking company, provision being made that "each stockholder shall be liable for the debts of the bank, created while he is a stockholder in said company, in proportion to the amount of stock held, owned, or subscribed for by him, at the time the debt was created." Ibid. 197. At the same session of the legislature a charter was granted to another institution, on condition that "the stockholders shall be bound and liable as sureties to contribute to the payment of the debts of the bank, each in an amount equal to the par value of the stock held by him at the time of the bank's failure or insolvency, or so much thereof as may be necessary." Ibid. 208. And in amending the charter of a bank previously incorporated, provision was made that "the private property of each and all of the corporators of the said institution for the time being shall be liable for the payment of all deposits made with said institution (and for all debts contracted or incurred by said institution) during their membership therein, in the same manner as in ordinary commercial cases or cases of debt." Ibid. 209. Still another scheme of liability was adopted in incorporating the Citizens' Bank of Augusta. Ibid. 194. In 1886 a charter was granted to the Commercial Bank of Atlanta, the act of incorporation stipulating "That each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his or her unpaid subscription to the capital stock of the corporation, and the stockholders of said corporation shall be individually liable to creditors of said corporation to the amount of the capital stock subscribed, or at any time held by them respectively." During the same year other acts of incorporation were passed, in each of which special provision was made as to the liability of shareholders. Ibid. 65, 70. In one of them the "individual property of the stockholder, at the time of suit," was declared to be subject to "the ultimate payment of the debts of the company in proportion to the amount of

stock owned by each stockholder." Ibid. 78. Different terms of liability were imposed on the stockholders of other banking institutions chartered in 1887. See Acts of 1886-7, pp. 333, 339, 341, 343, 360, 372. In the instance last noted, the liability feature was the same as in the act now under consideration. During the session of the legislature at which this act was passed, no less than twenty other charters were granted to banking institutions to be located at various points in the State. See Acts of 1888, pp. 56-135. An examination of these charters will disclose the fact that different terms of liability were imposed upon shareholders in each particular instance. The General Assembly seems not to have been at a loss for appropriate words with which to express the legislative will; and where its intent was to make all classes of stockholders accountable for the debts of the corporation, the intention so to do was clearly conveyed in language indicating that the terms "stockholders," "shareholders," and "subscribers" were not understood as being synonymous, but as having each a precise and independent meaning. For illustration, the act incorporating the Merchants' and Farmers' Bank of Hogansville declared, "That each stockholder shall be individually liable for the debts and obligations of said corporation to the extent of his or her paid-in stock, at its par value, and, in addition thereto, shall be liable for all debts and obligations of said corporation, to the extent of his or her capital stock, equally and ratably, and not one for another." At the succeeding session of the legislature as many as fifty-five new banking houses were incorporated, and amendments were made to a number of charters previously granted. See Acts of 1889, pp. 452-664. Still the General Assembly pursued the policy of specifying, in each case, under what conditions owners of stock might be held responsible for debts contracted by the corporation, and to what extent they would be liable therefor, if at all. And it was not until the act of 1893, providing for the incorporation of banks (Civil Code, §§ 1903-1911) that the legislature declared a settled policy as to liability of stockholders.

In view of all this legislation on the subject, we can not but conclude that the General Assembly intended each act of incorporation to speak for itself, and to be construed in accordance with the cardinal rule of construction, that words of ordinary

significance are to be given their usual and customary meaning. The particular act we are now called on to construe has irreproachable letter, but is apparently devoid of deducible spirit. We can not undertake to imbue it with this intangible attribute without doing violence to what we conceive to have been the legislative will; and therefore we follow the letter, with the result above announced.

Judgment in each case affirmed. All the Justices concur, except Simmons, C. J., absent.

SHARPE, administrator, v. MATHEWS.

1. A paper in the form of a deed, attested as a deed and delivered to the party named as grantee, and in the granting, as well as in the habendum and tenendum clause, purporting to convey the title in presenti, is not to be construed as testamentary in its character because it recites that the premises are to "remain the right and property" of the grantor "for and during her natural life," the purpose and effect of this recital being to reserve a life-estate in the grantor.
2. One who enters into the possession of land under a deed, claiming in good faith the land as his own, can not be summarily evicted from the premises as a tenant at sufferance.

Submitted July 11, — Decided August 4, 1905.

Eviction. Before Judge Roberts. Montgomery superior court. November 7, 1904.

Warren Grice, for plaintiff.

Garrard & Meldrim and *J. B. Geiger*, for defendant.

EVANS, J. On the second day of January, 1902, Betsey A. Mathews sued out a warrant to dispossess Daniel L. Mathews as a tenant at sufferance. He filed a counter-affidavit in which he denied that he was a tenant at sufferance or otherwise. On March 9, 1903, Betsey A. Mathews died, and on April 26 of the following year W. H. Sharpe, who had been duly appointed administrator upon her estate, was made a party plaintiff in her stead. On the trial of the case the plaintiff introduced the following documentary evidence: A deed from Neil A. Mathews and others to William C. Mathews, dated June 30, 1896, conveying to him the premises in question, and a transfer of this deed by William C. Mathews to Betsey A. Mathews, bearing the same date; also, a paper executed by Betsey A. Mathews, of

123	794
1128	390.

123	794
1129	497

which the following is a copy: "State of Georgia, Montgomery County. This indenture, made the 6th day of July, in the year of our Lord one thousand, eight hundred and ninety-six, between Betsey A. Mathews, of the County of Montgomery, of the one part, and Daniel L. Mathews, of the County of Montgomery, of the other part, witnesseth: that the said Betsey A. Mathews, for and in consideration of the sum of five hundred dollars in hand paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, convey, and confirm unto the said Daniel L. Mathews, his heirs and assigns," the tract of land conveyed to her by William C. Mathews, mentioned above. "Said tract of land is to remain the right and property of said Betsey A. Mathews for and during her natural life, and to become the property of the said Daniel L. Mathews, in fee simple, immediately upon the death of the said Betsey A. Mathews. In the event the said Betsey A. Mathews should survive said Daniel L. Mathews, then immediately upon the death of said Betsey A. Mathews said property is to become the property, in fee simple, of the heirs of said Daniel L. Mathews. As an additional consideration for said tract of land are the love and affection said Betsey A. Mathews bears for her son, the said Daniel L. Mathews, and the maintenance and support of said Betsey A. Mathews by the said Daniel L. Mathews for and during the remainder of her natural life. To have and to hold the said bargained premises, with all and singular the rights, members, and appurtenances thereto appertaining, to the only proper use, benefit, and behoof of him, the said Daniel L. Mathews, his heirs, executors, administrators, and assigns, in fee simple. And the said Betsey A. Mathews the said bargained premises unto the said Daniel L. Mathews, his heirs, executors, administrators, and assigns, and against the said Betsey A. Mathews, her heirs, executors, and administrators, and against all and every other person or persons, shall and will warrant and forever defend, by virtue of these presents. In witness whereof, the said Betsey A. Mathews has hereunto set her hand and affixed her seal and delivered these presents, the day and year first above written." This paper was attested by two witnesses. The scrivener testified, as a witness, that he drafted it at the in-

stance of Betsey A. Mathews; that she asked him to "draw the deed, and that the deed was written at his house." The attesting witnesses testified that they did not see any money paid at the time of the execution of the deed. Certain other witnesses were introduced and testified, that Betsey A. Mathews, about two years before her death, left the house of Daniel L. Mathews and took up her residence with a daughter, and that he did not thereafter contribute to her support. Daniel L. Mathews, who was sworn as a witness in behalf of the plaintiff, testified, that he did not pay the five hundred dollars recited in the deed, nor did he pay his mother, Betsey A. Mathews, anything at all; that he did pay the physician's bill for attending her during her last illness, and her burial expenses, as well as certain amounts for medicine; that he had paid taxes on the land and had furnished his mother with certain supplies while she was living with her daughter, and that he had done nothing to justify his mother in leaving his home. He further testified that he went into possession of the land under the paper executed and delivered to him by Betsey A. Mathews, entering in good faith and holding the possession and claiming the land under that instrument. After introducing this evidence, the plaintiff announced closed, and on motion of the defendant the court granted a nonsuit. Error is assigned upon the judgment of nonsuit.

1. The correctness of the ruling made by the trial judge upon the motion for a nonsuit depends in a large measure upon the construction to be put upon the instrument executed by Betsey A. Mathews and delivered to Daniel L. Mathews. The plaintiff in error insists that the paper is testamentary in its character, and that it is void because attested by only two witnesses. On the other hand, the defendant in error insists that the paper is a deed. In all essential respects it is similar to the instrument construed in *Griffith v. Douglas*, 120 Ga. 582, in which case it was held that where a paper is in the form of a warranty deed, and is attested as a deed and delivered to the party named as grantee, it should be treated, not as a will, but as a deed, notwithstanding it contains words to the effect that the enjoyment of the estate thereby conveyed is to be postponed until the death of the grantor. The paper now under consideration was executed in the form of a deed, was delivered to the grantee, and was produced

by him on the trial in response to a notice to produce. The habendum and the tenendum clause, "to have and to hold," was appropriate to a conveyance passing a fee-simple estate. The provision that the land was to remain the right and property of the grantor for and during her natural life occurred immediately after the description of the property, and indicated the intent of the grantor to convey the fee with a reservation of a life-estate in the grantor. The provision that if the grantor should survive the grantee, the land should, upon the death of the grantor, become the property, in fee simple, of the heirs of Daniel L. Mathews, simply indicated the intention of the grantor to convey an inheritable estate. Had this provision been omitted from the instrument, its legal effect would have been the same. The paper was a deed and not a will, and conveyed the title to the grantee, with a reservation of a life-estate in the grantor. See authorities cited in *Griffith v. Douglas*, supra.

2. Did the evidence show that the defendant was a tenant at sufferance? His contention was that the deed conveyed the title to him and gave him an immediate right to the enjoyment of the premises. He evidently construed the reservation of a life-estate as amounting to no more than a charge upon the land for the support of his mother, the grantor, during her natural life. This was an erroneous construction of the deed, but it illustrates the nature and character of the defendant's possession. He testified that he entered into possession of the land, claiming it as owner under the deed from his mother. He did not hold under her as her tenant, nor recognize that she had any interest in the premises. The relation of landlord and tenant did not, therefore, exist, and the summary proceeding authorized by the Civil Code, § 4813, was not available. *Watson v. Toliver*, 103 Ga. 123. "To create the relation of landlord and tenant between parties, a formal letting is not required. The relation may arise by implication, and, as a general rule, it is sufficient to create the relation if it appears to have been the intention of one to enter or occupy the premises in subordination to the title of the other. But the relation will never be implied when the acts and conduct of the parties are inconsistent with its existence. . . . A tenant is generally defined as one who occupies the lands or premises of another in subordination to that other's title, and with his

assent, express or implied." 18 Am. & Eng. Enc. Law (2d ed), 164-5. When title is shown in the plaintiff and occupation by the defendant, an obligation to pay rent is generally implied; but if the entry was not under the plaintiff, or if the possession is adverse to him, no such implication arises. Civil Code, § 3116. The defendant can not properly be regarded as a tenant at sufferance. According to the definition stated in 2 Bl. Com. 150, "an estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all." This definition was recognized and acted on by this court in *Godfrey v. Walker*, 42 Ga. 562, 575. See *Willis v. Harrell*, 118 Ga. 906. "A tenancy at sufferance arises when a man comes into possession lawfully, but holds over wrongfully after the determination of his interest, differing in this respect from a tenancy at will, where the holding is by the landlord's permission." 1 Taylor's Land. & Ten. (9th ed.) § 64. That is to say, such a tenancy is created where one enters into possession under a lawful demise, and his retention of possession after the expiration of his term is by the mere laches or neglect of the owner to take possession of the premises, where the entry is lawful, but the holding over is wrongful. There is no evidence that would authorize the conclusion that the grantor put upon the deed a construction different from that placed upon it by the defendant. The only evidence touching the nature of his possession was the testimony of the defendant himself, which discloses that his possession was not that of a tenant, but that he occupied the premises under a bona fide claim of title thereto. Under these circumstances, he could not be summarily evicted as a tenant holding over, and the judgment awarding a nonsuit should not be disturbed.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

PALMETTO MFG. CO. v. PARKER & ANDERSON.

1. "Where a creditor, his debtor, and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, the case is not within the statute of frauds, but the debt is extinguished as to the debtor, and the third person becomes, by substitution, the debtor in his place."

2. While the petition alleged an agreement between the debtor and defendants, who owed him, to pay the former's debt to the plaintiff, the averments were not sufficient to show that the plaintiff was a party to the agreement, or that the defendants made to it any promise to pay the debt.
3. The demurrer was properly sustained.

Submitted June 21, — Decided August 4, 1905.

Complaint. Before Judge O'Steen. City court of Douglas. September 27, 1904.

The Palmetto Manufacturing Company sued Parker & Anderson, a mercantile copartnership, alleging in its petition as follows: The defendant firm is indebted to plaintiff in the sum of \$202.63. On February 16, 1903, and March 13, 1903, plaintiff sold two bills of merchandise to J. M. Parker, aggregating \$202.63. Thereafter J. M. Parker sold his entire mercantile business to Parker & Anderson, at which time it was agreed between Parker and Parker & Anderson that the defendants were to assume and pay all indebtedness that might exist against J. M. Parker for the purchase-price of goods which had been previously bought by him. By reason of this agreement, Parker & Anderson agreed with J. M. Parker to pay the plaintiff the amount sued for, and J. M. Parker agreed for them to retain out of the purchase-money due him the sum of \$202.63, which amount they retained for the express purpose of paying the indebtedness due by Parker to the plaintiff. The 6th paragraph of the petition was as follows: "That the Palmetto Manufacturing Co. was informed of the agreement between said J. M. Parker and the firm of Parker and Anderson; that the said Palmetto Manufacturing Co. agreed and consented for this defendant to be substituted for J. M. Parker and become their debtor in the place and stead of J. M. Parker, and that J. M. Parker be relieved and released from any indebtedness to them; that said defendant was notified by this petitioner of petitioner's consent to the change above set out and described." The petition alleges a demand upon the defendants and a refusal to pay. The defendants demurred to the petition, upon the grounds, that no cause of action is set out; that no privity of contract is shown between the defendants and the plaintiff and J. M. Parker; and because no written contract is shown whereby the defendants agreed to pay the debt of J. M. Parker to the plaintiff. The demurrer was sustained, and the plaintiff excepted.

Lankford & Dickerson, for plaintiff.

Quincey & McDonald, for defendants.

COBB, J. "Where a creditor, his debtor, and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, the case is not within the statute of frauds, so as to require the agreement to be in writing, but the debt is extinguished as to the debtor, and the third person becomes, by substitution, the debtor in his place." *Sapp v. Faircloth*, 70 Ga. 690. See also, to the same effect, *Brown v. Harris*, 20 Ga. 403; *Harris v. Young*, 40 Ga. 65; *Anderson v. Whitehead*, 55 Ga. 277; *Steadwell v. Morris*, 61 Ga. 101; *Ferst v. Bank of Waycross*, 111 Ga. 229. In order, therefore, to take such a transaction without the operation of the statute of frauds, it must appear that the person substituted for the debtor was, by agreement between the creditor, the debtor, and himself, substituted for the original debtor, who was released from the promise. In other words, it must be shown that the person substituted as the debtor in the place of the person released, became such as the result of an agreement in which all three concurred. In every case, either there must be an express promise to pay the creditor by the person assuming the debt, or the conduct of such person must be such as that a promise to pay the debt can be implied. Of the latter character was the case of *Davis v. Tift*, 70 Ga. 52.

In the light of these principles, what is the legal effect of the petition in the present case? It is clear from the allegations that Parker, the original debtor, and the defendants entered into an agreement by which they were to pay Parker's debt to the plaintiff. In furtherance of this agreement they retained from money due by them to Parker the amount of such debt. It is obvious, therefore, that, as between Parker and the defendants, they were under a legal duty to apply the amount retained to the debt due the plaintiff. If Parker has not been released from the debt to plaintiff, and he is compelled to pay to the plaintiff, he would have his action against the defendants for a breach of their undertaking with him. The sixth paragraph of the petition alleges that the plaintiff was informed of the agreement between Parker and the defendants, and "agreed and consented" for the defend-

ants to be substituted for Parker. Clearly this was not intended to amount to an averment that the defendants made any promise to the plaintiff to pay to it the amount of Parker's debt. Properly construed, the allegations are simply that the plaintiff heard of the agreement between Parker and the defendants, and interposed no objection, but approved such an arrangement and was willing to abide by it. The allegation that the defendants were notified by the plaintiff that it consented to the agreement, in the absence of an allegation that the defendants and Parker then concurred in the substitution, would not prevent the case from being obnoxious to the statute of frauds. There was no error in sustaining the demurrer.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SWEAT v. SWEAT

On the hearing of an application for "temporary alimony, including expenses of litigation," the judge may allow as counsel fees such sum as in his discretion appears proper under all the facts and circumstances of the case, although there is no evidence before him fixing any amount as the value of the services rendered and to be rendered by the plaintiff's counsel

Submitted June 21, — Decided August 4, 1905.

Application for temporary alimony. Before Judge Parker.
Clinch superior court. February 18, 1905.

Lula E. Sweat brought suit for divorce against her husband, S. A. Sweat, and, pending the suit, filed an application for an allowance for temporary alimony and counsel fees. The application was submitted to the judge on affidavits for both parties, such affidavits relating entirely to the conduct and character of the husband. There was no evidence before the judge as to the husband's financial condition, but he admitted, in his answer to the suit, that he was sheriff of Clinch county; that the income from his office was from nine hundred to one thousand dollars a year; that he had twelve shares of bank stock worth \$1,200; and that he owned real estate worth \$2,500. The judge allowed the plaintiff \$20 per month for her support and \$75 counsel fees. The defendant excepted. The only contention made by the plaintiff in error in this court is, that, as there was no evidence of the

value of the services of the plaintiff's counsel, it was erroneous to allow any sum as counsel fees.

S. C. Townsend, R. G. Dickerson, Toomer & Reynolds, and D. A. R. Crum, for plaintiff in error.

Wilcox & Johnson and Walter T. Dickerson, contra.

COBB, J. The code provides that in applications for temporary alimony, "after hearing both parties, and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify." Civil Code, § 2457. The only requirement of the code is that the court shall hear evidence of the marriage and of all the facts and circumstances of the marriage before allowing temporary alimony, which shall include *expenses of litigation*, under which head fall counsel fees. The judge may hear the testimony of expert witnesses on the value of the services of the plaintiff's counsel. But is he bound to do this? Counsel fees are allowed as a part of the wife's maintenance, to enable her to litigate the questions at issue between herself and her husband, and are as necessary as an allowance for support. *Sprayberry v. Merk*, 30 Ga. 81. In *Campbell v. Campbell*, 67 Ga. 423, while there was evidence as to the value of the services of counsel, it was held that "the sums allowed for counsel fees and support pendente lite are dependent on the circumstances of the parties and the facts of the case. . . It is much in the discretion of the chancellor to fix fees and the amount needed for support." While the judge may hear the evidence of attorneys as to the value of the services of the plaintiff's counsel, he is not bound by such evidence, but may award a less amount than the services may appear therefrom to be worth. *Dicken v. Dicken*, 38 Ga. 663, 670. It has also been held that a jury is not bound absolutely by the testimony of an expert witness as to what would be reasonable attorney's fees in a given case. *Baker v. Richmond Works*, 105 Ga. 225. And that an auditor would likewise not be so bound. *Brown v. Ga. Min. Co.*, 106 Ga. 518. In *Peyre v. Peyre*, 79 Cal. 336, it was held: "The court may require the husband to pay to the wife temporary alimony and a reasonable attorney's fee; and no testimony is

necessary to determine what the amount of the fee should be. The court may determine what is a reasonable fee, from its own experience, and from the facts and circumstances of the case appearing before it; and may base the allowance on the ability of the husband to earn money, though it does not appear that he has money or other property with which to pay the amount allowed." To the same effect, see *Llamosas v. Llamosas*, 62 N. Y. 618. A different conclusion seems, however, to have been reached in *Jeter v. Jeter*, 36 Ala. 391, (7). See also *Blair v. Blair*, 74 Iowa, 311. The judges of the superior courts of this State are experienced and able lawyers. Before coming to the bench they were for years engaged in the practice. Doubtless most if not all of them participated in the trial of alimony cases. It would be strange if practicing lawyers were more capable of fixing counsel fees than the judges. Besides, as shown above, it has been expressly decided that the judge is not bound by the estimate placed by attorneys upon the services of their brother attorney in the particular case. Why require such evidence, if the judge can disregard it? The code requires that he shall examine into all the circumstances of the case. This would include the financial condition of the husband, the social position of the parties and their previous manner of living, and the needs of the wife. Evidence of these facts affords a sufficient basis for fixing an allowance for temporary alimony, which includes the expenses of litigation. We think that, under the language of the section of the code above quoted, the judge is not bound to hear expert evidence as to counsel fees. Whether the same rule would apply in a case heard before a jury we do not now decide. In the present case the judge could find that the defendant had an income of a thousand dollars a year, and owned property worth nearly four thousand dollars. Certainly it was not an abuse of discretion to allow seventy-five dollars as attorney's fees. The judge could well decide, without the aid of expert testimony, that the services of the plaintiff's attorneys were worth at least the sum he allowed them.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

SILVEY & COMPANY v. TIFT, trustee.

1. Where creditors filed a petition to have a debtor adjudged an involuntary bankrupt, alleging several acts of bankruptcy, among them being that while insolvent he made a preference to a firm, named as creditors, within four months before the filing of the proceedings; and after adjudication in bankruptcy the trustee brought suit against such firm, alleging that they received a preference with reasonable ground for believing that it was such, the adjudication in bankruptcy duly made was conclusive of the status of the bankrupt as such, but did not estop the defendants from setting up by way of defense, that, some time prior to the proceedings in bankruptcy, they sold to the bankrupt goods, relying on certain representations made by him; and that they discovered that such representations were untrue, and rescinded the sale on account of fraud and retook their goods.
2. Where such a defense was made, and the defendants sought to show that the purchaser returned to them after the sale and stated that he had made a material misrepresentation, and thereupon they rescinded the sale, in a suit by the trustee in bankruptcy afterwards appointed, against them as preferred creditors who had taken with reasonable ground to believe that a preference was made, it was error to instruct the jury that they could consider the statement so made, solely for the purpose of impeaching the bankrupt, who was a witness for the plaintiff.
3. If one purchasing goods makes a false representation as to a material matter, and the owner relies on such statement in making the sale, upon discovering the fraud he may rescind and reclaim his property, or so much of it as is still in the hands of the purchaser; or he may elect to continue the contract. If he elects to rescind, he must give notice to the purchaser thereof, and of his determination to reclaim the goods sold; and if he has received anything in payment, he must return it or tender it to the purchaser.
4. If a vendor, in reliance upon material misrepresentations, has made a sale and has rescinded it on discovery of the fraud, but all of the property sold is not in the possession of the purchaser and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all of the property which can be recovered. As to that which he can not recover, he may have a right of action against the purchaser, not upon the contract of sale, but based on the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. He can not, however, proceed both under the contract of sale and against it.
5. While in the present case there may have been sufficient evidence to authorize the verdict, it was not so clearly demanded that a new trial will not result from the errors of law.

Submitted June 26, — Decided August 4, 1905.

Complaint. Before Judge Reid. City court of Atlanta.
December 17, 1904.

Tift, as trustee in bankruptcy of Griffin, brought suit against

John Silvey & Company, alleging as follows: On March 15, 1902, Griffin, while insolvent, transferred and delivered to the defendants a portion of a certain stock of goods belonging to him. At the time of the transfer he was insolvent, and the defendants knew and had reasonable cause to believe that such was the case. The effect of the transfer was to enable them to obtain a greater percentage of their debt than the other creditors of the bankrupt of the same class received, and was a preference in contemplation of the act of Congress of July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States." The defendants received this preference, and had reasonable cause to believe that it was intended to give them a preference in contemplation of the act of Congress. They took possession of the property, carried it away, and converted it. On April 29, 1902, certain creditors of Griffin filed a petition in bankruptcy in the district court of the United States, alleging the commission of certain acts of bankruptcy by him, and praying that he be adjudicated a bankrupt. He was duly adjudicated a bankrupt, and the plaintiff was appointed trustee. In that capacity and under leave of the court, he sues to recover of the defendants the value of the property so taken by them, which is alleged to be \$1,400. The plaintiff alleged that the defendants were concluded and estopped from setting up in this suit "any defense in contradiction to the following facts." The petition then contains what appears to be a copy of a part of the petition in bankruptcy. A demurrer having been filed, the entire petition was set out by amendment, which showed that a number of creditors of Griffin filed a petition to have him adjudicated a bankrupt, alleging him to be insolvent. Three acts of bankruptcy were alleged: First, that, within four months next preceding the filing of the petition, Griffin, while insolvent, transferred a portion of his property, namely a large part of his stock of goods, of the value of \$500, to one Weslosky, doing business under the trading name of the Albany Grocery Company, a creditor, with intent to prefer him over his other creditors. Second, that, while insolvent and within four months next preceding the filing of the petition, he transferred a portion of his property, namely about \$1,400 worth of hats, shoes, and dry goods, to John Silvey & Company, creditors of his, with intent to prefer them over his other creditors. Third,

that, while insolvent and within four months next preceding the date of the petition, he suffered and permitted one Turner, a creditor, to obtain a preference through legal proceedings, and did not within five days before the sale of the property vacate or discharge such preference, the levy being under a distress warrant for rent for \$127, and being made upon a lot of hats, shoes, dry goods, etc., which were sold under the warrant, and the proceeds applied to the payment thereof. A subpoena issued to the alleged bankrupt on April 29, 1902, and on May 28 he was adjudicated a bankrupt. Later the trustee was regularly appointed.

To that portion of the petition which set up an estoppel a demurrer was urged on the ground that some of the allegations were not properly pleaded, and did not set out facts constituting an estoppel, and merely alleged legal conclusions. The allegations demurred to were as follows: "Petitioner further represents that defendants to this case are concluded and estopped from setting up in this suit any defense in contradiction to the following facts." Also, "The allegations of said petition set out above, being necessary allegations of said petition, the said John Silvey & Co. could then and there have pleaded, in defense to said petition, denial of the facts set out in the allegations of said petition transcribed above, and, having failed in said court to sustain any denial or contradiction of any of said facts and allegations, they are now concluded and estopped from contradicting and denying them, because of the judgment of the district court of the United States of the southern district of Georgia, made in said matter in favor of the petitioners in bankruptcy, declaring said Ernest H. Griffin bankrupt, said judgment being made and rendered duly and regularly by a court of competent jurisdiction." The court overruled the demurrer to the declaration as amended, and exceptions pendente lite were taken. The jury found for the plaintiff \$468.68 principal, besides interest. Defendants moved for a new trial, which was refused, and they excepted. They also assigned error on the overruling of the demurrer.

*Candler & Thomson and W. D. Thomson, for plaintiffs in error.
Arthur Gray Powell and Shepard Bryan, contra.*

LUMPKIN, J. (After stating the facts.) 1. The demurrer to the original declaration contained various grounds, but only one is now insisted on. We do not think it good pleading to allege

that a defendant is estopped from setting up any defense in contradiction "to the following facts;" and then to set out an entire proceeding in bankruptcy, containing various allegations, several grounds for the proceeding, the adjudication and the appointment of the trustee, and to allege in sweeping terms that the allegations set out are necessary allegations, and that the defendants could have pleaded in defense of them, but failed to do so, and are estopped from contradicting or denying them. This leaves the court to ascertain what defense the pleader deems to be in conflict with "the following facts." Moreover to copy a part of a proceeding in bankruptcy and to allege generally that it comprises necessary allegations is a conclusion. It appears from the order overruling the demurrer that this was done after amendment, from which we presume that it was renewed after the amendment had been made. The real question argued before us was whether the adjudication in bankruptcy was conclusive on the defendants to the effect that the goods sued for belonged to the bankrupt on March 15, 1902, and were transferred by him to them with intent to prefer them as creditors over his other creditors, he being insolvent at the time. Their defense was that they had sold goods to Griffin upon certain representations made by him; that they ascertained that these representations were false, and the goods were therefore procured from them by fraud; and that they thereupon rescinded the sale and retook such of the goods as were on hand, not as a payment or preference to creditors, but as being a taking possession of their own goods. If the plaintiff's contention as to the effect of the adjudication is correct, the defendants would be practically precluded and estopped from defending at all, save possibly on the question of notice; and there would be little to do but take a verdict for the value of the goods. The allegations which he says are necessary, in the petition to have Griffin adjudicated a bankrupt, include not only his insolvency, but also a statement of a transfer by him of a portion of his property to the defendants, the value of the goods so transferred, and that this was a preference. The presiding judge overruled the demurrer.

An adjudication in bankruptcy is in the nature of a proceeding in rem, and the adjudication is in the nature of a decree in rem so far as it fixes the status of the defendant in the proceeding as a

bankrupt. Considered in the light of a proceeding in rem, the res involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All persons are bound by the adjudication to that effect; and this was true under the act of 1867 as well as under the act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a competent court, unless it appeared that the decree was void in form or that due notice was not given. *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S. 656; *Chapman v. Brewer*, 114 U. S. 158; *Shawhan v. Whertritt* (under the act of 1841), 7 Howard, 158; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192. Where a proceeding in rem is against a particular piece of property, as a vessel, for charges against it, it is generally taken into possession, and the property itself is treated as the defendant liable for its own debts or defaults; and after seizure, subsequent proceedings are had by citation to the world, of which the owner is at liberty to avail himself by appearing in the case. In the present case, however, there was no such proceeding in rem against these goods. The proceeding was to determine the status of Griffin as a bankrupt, and it neither was nor could have been commenced by a seizure of the property claimed by the defendants. *Mankin v. Chandler*, 2 Brock. (U. S. C. C.) 125; *The Sabine*, 101 U. S. 388; *Freeman v. Alderson*, 119 U. S. 187. To illustrate further, proceedings to appoint an administrator are also in the nature of proceedings in rem, and, where the court has jurisdiction, are not subject to collateral attack. But it will not be contended that if a person applies for administration, and sets out in his petition that the entire estate of the decedent consists of a certain house and lot, the judgment appointing him would establish the title of the estate to the property, if in fact it belonged to another than the decedent. The judgment would establish the status of the applicant as an administrator, and that he was duly appointed, but would not determine the title to property. There are two kinds of actions which are commonly spoken of as proceedings in rem. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant; but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class

of actions, which are strictly in rem, the judgment is against the property alone. The other class of proceedings in rem are proceedings to determine the status of some person or subject-matter. Such are judgments of outlawry, appointments of guardians, administrators, etc.,—where the proceeding is to determine status, not title to property. The res which makes it a proceeding in rem is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment in rem has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. *Stroupper v. McCauley*, 45 Ga. 74, 78; *Childs v. Hayman*, 72 Ga. 791, 796–7; *Woodruff v. Taylor*, 20 Vt. 65.

In the act of 1898 it is provided that "The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow." Sec. 18 b, 1 Fed. Stat. Ann. 583. The bankrupt and his creditors are those given an opportunity to appear and defend against the adjudication in bankruptcy. The defendants in the present case, however, do not claim to be creditors, or defend as such, but contend that they were defrauded out of certain goods, and upon discovering the fraud rescinded the trade and resumed possession of their own goods. To compel them to admit that they were creditors and received the goods as such would require them to waive their defense before they could make it. In some of the decisions creditors are spoken of as being privies of the bankrupt. Often, however, they claim against the debtor rather than as privies. To hold that creditors could, by the petition in bankruptcy and the adjudication, conclusively subject the property of third parties, and make it a part of the estate of the bankrupt, if in fact it was not so, would be to go far beyond the determination of his status. To put an extreme case, suppose that creditors should seek to have their debtor declared a bankrupt, and in their petition should allege that he had conveyed a house and lot to a named person, as one among other grounds of the proceeding, when in fact the debtor had never owned the house and lot, and had never transferred it to the person named at any time. Clearly an adjudication that the debtor was a bankrupt would not invest him or his trustee with title to the property, or

operate to take away the title of the real owner, who had never been sued or summoned into court, and who, perhaps, never heard of the proceeding. In such a case, to hold that the adjudication of bankruptcy against the debtor would take away the property of a third person, and add it to his estate, would approximate more nearly confiscation than adjudication. Suppose one should steal the property of another, and upon its discovery the real owner should resume possession; if later creditors of the thief should file a petition in bankruptcy against him, alleging that he had given a preference to the owner, surely an adjudication that the thief was a bankrupt would not vest the stolen property in him or the trustee. The object of the proceeding is to have the debtor adjudged to be a bankrupt, not to recover property from third parties. They can not deny that he is a bankrupt, but they can deny that he owns their property. To adjudge A's status is not to adjudge B's property. In the case of *Traders Ins. Co. v. Mann*, 118 Ga. 381, 382, where a policy of insurance had been transferred by a debtor to creditors, and the debtor was afterwards adjudicated a bankrupt, it was held, "That the adjudication in bankruptcy was based on the fact of such preference having been made did not of itself authorize the trustee to ignore the assignment; but it would have been necessary to have the same set aside, or secure a reassignment in writing, before he could sue on the policy in his own name." In the opinion Mr. Justice Lamar said: "The adjudication in bankruptcy was not binding on them [the creditors who received the policy]. As a judgment in rem it conclusively fixed the status of Screws as a bankrupt, but Everett, Ridley, Ragan & Company had still a right to be heard on the validity of the transfer. They might have been able to show that it was not made within four months before the filing of the petition in bankruptcy, or that they had acted in good faith, without notice of insolvency, and purchased the policy for full value."

In *Lewis v. Sloan*, 68 N. C. 557, it was held: "The jurisdiction of a bankrupt court being conceded, its adjudication of bankruptcy is a judgment in rem fixing the status of the bankrupt which upon that point is binding upon all the world, and can only be impeached for fraud in obtaining it. . . Every court, however, in which a controversy as to the title to the property,

alleged to have been fraudulently conveyed may arise, has jurisdiction to inquire whether the conveyance was in fact and in law fraudulent, i. e. whether the conditions prescribed by the act to make it fraudulent existed." In the opinion it was said: "Although the adjudication of bankruptcy is a judgment in rem and as such conclusive on all the world, and although in arriving at that judgment the bankrupt court declares the conveyance alleged as the act of bankruptcy to be a preference among creditors, and therefore fraudulent within the meaning of the act, yet such declaration is no part of the judgment, but is merely incidental to it, and, so far from being conclusive on strangers that the conveyance was fraudulent, is not even evidence against them for that purpose. It is merely 'res inter alios acta quæ nemine nocere debet.' No one not a party to the record is affected by it, except so far as it is in rem. [Duchess of Kingston's case, 2 Smith's L. C. 438 to 447.] *Barrs v. Jackson*, 1 You. & Coll. 585, s. c. 1 Phil. 582. Of the American cases see *King v. Chase*, 15 N. H. 9. In addition to what is said in those cases, there is a reason why the effect of a judgment in rem should be more closely confined to the precise point adjudged, viz, that, so far as it is in rem and fixes the status of the person or property affected, it binds all the world; whereas a judgment in personam binds only parties and privies who have once had an opportunity of contesting it." In *Neustadter v. Chicago Dry Goods Co.*, 96 Fed. 830, it was held by Judge Hanford, of the United States district court, that, "Where the issues arising upon a petition in involuntary bankruptcy were decided adversely to the petitioners, and an order dismissing the proceedings, no notice of the proposed dismissal being given to the other creditors," certain of such other creditors could not have the case reinstated, but were not debarred from bringing a new and independent petition in bankruptcy against the debtor.

In *re Ulfelder Clothing Co.*, 98 Fed. Rep. 409, where in a petition for involuntary bankruptcy the debtor and one of his creditors answered the petition, putting in issue the allegation of insolvency, and also denying that the petitioner was a creditor, and on a trial the allegations of the petition were found to be true, and an adjudication in bankruptcy made, it was held to be conclusive evidence of the validity of the petitioner's claim when

it was presented for an allowance as a claim against the bankrupt's estate, and that it could not be disputed either by the bankrupt or a creditor who joined in the proceedings and opposed the adjudication. But the petitioning creditor having put in evidence certain promissory notes made by the debtor to third parties for the purpose of proving insolvency, and the debtor having contested their validity and consideration, and upon the hearing, with evidence on both sides, the court having found the allegations of the petition to be true, and made an adjudication of bankruptcy, it was held that as such notes were not directly in issue, but only collaterally brought in question, and as the holders thereof were not parties to the proceeding, the adjudication in bankruptcy was not conclusive of their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate. In the course of the opinion De Haven, District Judge, said: "If the court, upon the evidence then before it, had found against their validity [that is, the validity of the notes of the other creditors], and for that reason had adjudged that the corporation was not insolvent, and dismissed the proceeding, such finding and judgment would not have constituted a bar to a subsequent action by Henry Ulfelder and A. Levy [holders of the notes] against the bankrupt to recover upon the same claims. They would not have been estopped by such a judgment, because, not being parties, the question of the validity of their present claims was not, and could not have been, litigated by them in the insolvency proceeding. In the case of *In re Schick*, 2 Ben., 5 Fed. Cas. No. 12,455, the defendant was adjudged a bankrupt upon the ground that a certain judgment confessed by him in favor of one Cowen was an act of bankruptcy, and in the course of the opinion it was said by Blatchford, J.: 'This proceeding, however, is, so far, one merely between the petitioning creditor and the debtor. Cowen is no party to it, although examined as a witness for the creditor; and in the further progress of the matter, if the assignee of the debtor to be appointed should institute proceedings to realize, for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from doing so.' And in the case of *In re*

Drummond, 1 N. B. R. 231, Fed. Cas. No. 4,093, McDonald, J., in adjudging the defendant bankrupt because of his act in preferring certain creditors, said: 'It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in this case. . . And, indeed, as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest, except so far as it fixes the status of Drummond as a bankrupt.' See, also, *In re Dibble*, 3 Ben. 283, Fed. Cas. No. 3,884."

In *Magnus v. Hetcham*, 112 Fed. 752, it is stated broadly in the syllabus that "An adjudication of involuntary bankruptcy, duly entered on default for want of an answer to the petition, is as binding on the bankrupt and creditors as one entered upon a hearing, and is conclusive of the commission of the acts of bankruptcy charged in the petition." A careful examination of the entire case, however, will show that the real question was whether the adjudication was binding on the question of the insolvency of the bankrupt, and that the creditor who was held to be concluded was a judgment creditor who had obtained the judgment by confession; that in connection with the proceedings in bankruptcy an injunction was prayed for and issued, restraining a sale under the execution; that the creditor appeared and moved to dissolve the injunction, and by agreement a modification was made in the order, and he had ample opportunity to contest the point in issue.

A slight consideration of the difference between the issues involved in a proceeding of bankruptcy, and a suit to recover property from a person holding it adversely and claiming to be the owner, will show that the two proceedings are not identical, and that the former is not conclusive of the latter except as to determining the status of the bankrupt as such. The issue in the former proceeding is whether the debtor is or is not a bankrupt within the meaning of the act of Congress. Where it is sought to recover property from one alleged to be a creditor who has received a preference, the proceeding rests upon section 60 b of the bankrupt act, which reads as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication,

and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." The various requisites to a recovery under this section of the act are quite different from the mere determination upon the proceedings in bankruptcy that the debtor is a bankrupt.

This position may be further illustrated by considering a voluntary proceeding in bankruptcy. While differing from a proceeding in invitum, the adjudication there as to the status of the bankrupt would also be to some extent in the nature of a judgment in rem, so as to show that he was a bankrupt; but certainly it would not be pretended that a person voluntarily going into bankruptcy could possess himself of property which did not belong to him, or have the title to property claimed by third parties adjudicated to be his, no matter what allegation he might make in his petition or schedule.

The adjudication in bankruptcy, therefore, conclusively determined the status of Griffin as a bankrupt, but did not conclude the defendants from making their defense on a suit by the trustee in bankruptcy against them to recover the property.

In the answer of the defendants no reference is made to other property except that which they claim to have been obtained from them by fraud, and to have been recovered. It appears from the evidence that they received other property also. The question whether in fact there was a rescission for fraud, or whether there was a preference, in view of the entire evidence, was for the jury. The ground of demurrer insisted on should have been sustained. The adjudication in bankruptcy could be pleaded, but the effort to estop the defendants from pleading rescission for fraud can not succeed. True the court charged that the adjudication in bankruptcy did not conclude the defendants except as to the insolvency and proper adjudication of bankruptcy; but the other ruling remained unreversed.

2. Evidence was introduced to show that Griffin made a certain statement to the defendants as a basis of credit, that they extended credit to him, and that subsequently he informed them that such statement was not true in fact and that it did not cor-

rectly give the amount of his indebtedness; and they insist that thereupon they rescinded the sale for fraud, and retook their goods. The court charged as follows: "Certain evidence, gentlemen, has been permitted to go to you as to the alleged statements made by Griffin. . . Any statement made by Griffin, if he made statements, would not be binding upon this plaintiff in this suit as admissions, and such evidence as has been allowed to go to you with reference to the alleged statements of Griffin is to be considered by you exclusively on the question as to whether Griffin was successfully impeached or not, and should not be considered by you as an admission of Griffin's, binding upon the plaintiff in this case." One question in the case was whether, if there was a preference, those receiving it had reasonable cause to believe that a preference was intended. On this branch of the case the statements of Griffin to them were admissible and proper for consideration. They were not, of course, binding or conclusive on the plaintiff, but as bearing on the question of knowledge by the defendants they could be considered; and it restricted the use of this evidence too much to confine it solely to the matter of impeaching Griffin as a witness. The Civil Code, §5176, declares that "When, in a legal investigation, information, conversations, letters and replies, and similar evidence, are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." And section 5179 says: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible as part of *res gestæ*. See also *McLean v. Clark*, 47 Ga. 24; *Cook v. Pinkerton*, 81 Ga. 89; *Cohen v. Parish*, 105 Ga. 339; 3 Wigmore on Evidence, §1777.

3. If one purchasing goods makes a false representation as to a material matter, and the owner of the goods relies on such statement and sells, upon discovering the fraud the owner may rescind and reclaim his property, or so much of it as is still in the possession of the purchaser. In order to rescind it is not necessary that the purchaser should consent to a rescission, or make a new contract with the vendor for that purpose. The vendor upon discovering the fraud may elect to rescind or to continue the contract. If he elects to rescind, he must give notice to the purchaser of such election and of his determination to reclaim the

goods sold; and if he has received anything in payment, he must return it or tender it to the purchaser. If, however, the transaction which is claimed on the one hand to have been a rescission, and on the other to have been a preference, was accomplished by consent or agreement between the vendor and purchaser, it is not error for the trial court to submit that fact to the jury to aid them in determining what was the real nature of the transaction. Upon the right of a vendor to rescind upon discovering that he has acted on a false representation in making a sale, see *Clayton v. O'Conner*, 29 Ga. 687; *Woodruff v. Saul*, 70 Ga. 271; *E. T. V. & Ga. Ry. Co. v. Hayes*, 83 Ga. 558; *Newman v. Clafin Co.*, 107 Ga. 89; *Mashburn v. Dannenberg Co.*, 117 Ga. 567; 1 Benj. Sales (6th Am. ed.), § 661; 24 Am. & Eng. Enc. L. (2d ed.) 643; 1 Bigelow on Fraud, 76.

4. If a vendor in reliance upon material misrepresentations has made a sale, and has rescinded it on discovery of the fraud, but all of the property sold is not in the possession of the purchaser, and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all the property which can be recovered. As to that which he can not recover, he may have a right of action against the purchaser, not upon the contract, but based on the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. 2 Mechem on Sales, § 909, and cit.; *Hersey v. Benedict*, 15 Hun, 282; *Sleeper v. Davis*, 64 N. H. 56; *Cragg v. Arendale*, 113 Ga. 181; *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658. He can not, however, proceed both under the contract of sale and against it. He can not take back such of the goods as remain on hand as part payment of the indebtedness arising from the contract of sale, and retain a claim or seek payment for the balance of the purchase-price. These two positions would be inconsistent.

5. It is insisted by the defendant in error that the evidence demanded the verdict, and that there should be an affirmance independently of the consideration of any alleged errors on the part of the court. There was undoubtedly ample evidence to have sustained a finding in favor of the plaintiff, but we are not prepared to hold that it so plainly required a verdict for him

that an affirmance must necessarily result. The plaintiff contended that there was not in fact a legal rescission, but that Griffin, being insolvent and about to fail, came to Atlanta and conferred with the defendants for the purpose of giving them a preference; that the matter of rescission, now sought to be set up, was not the real transaction between the parties; that the admission of having made a misstatement was merely colorable; that the defendants took not only their own goods but other goods of Griffin, and that they did not merely seek to reclaim goods on the ground of an alleged fraud, but to get paid for the contract price, crediting the goods received thereon, both those bought from them and others. The defendants claimed that there was a bona fide rescission, and not a preference; that if any goods were received by them in connection with the rescission which were not included in their sale to Griffin, it was a mere accident, and not intentional; and that the receipt of other goods later was a separate and distinct transaction for the purpose of partly compensating them for such of their goods as could not be reclaimed. Of course, any receipt of additional goods in payment would not stand on the basis of a rescission. While the jury might have found a verdict in favor of the plaintiff, we can not hold that it was so clearly demanded as to require an affirmance.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

CROSS *et al.* v. COFFIN-FLETCHER PACKING CO.

1. Where a motion for a new trial was filed during the November term, 1904, and an order was passed requiring the respondent to show cause, on a day named during the next term, why the motion should not be granted, and allowing the movants until the final hearing "to present for approval a brief of the evidence," the court had authority, on the day fixed in the order for the hearing of the motion, to approve and allow filed a brief of evidence then presented.
2. On the trial of an action for damages claimed to have been sustained by reason of the levy of an attachment upon a stock of goods, it was error to allow an answer to an interrogatory to be read, stating merely in general terms that the plaintiff had suffered damage in a named sum because the goods levied on were kept in stock by reason of the levy. Such evidence was too general, stated merely a conclusion of the witness, and should not have been admitted over an objection made at the time upon this ground.

123	817
123	700
123	817
124	1055
123	817
1127	785

3. There were inaccuracies in the charge which should be corrected on another trial.

Argued June 26, — Decided August 4, 1905.

Action on bond. Before Judge Calhoun. City court of Atlanta. January 14, 1905.

The Coffin-Fletcher Packing Company brought suit against Cross, Brown, and the Fidelity and Deposit Company, on an attachment bond. The petition alleged, that the attachment case had been finally decided in favor of the Coffin-Fletcher Packing Company, and that by reason of the attachment it had sustained damages as follows: \$200, attorney's fees; \$77.15, for releasing garnishments and collecting accounts due; \$86.20, expenses and damages caused to goods by being held in stock by reason of the attachment and levy; \$20, cost of bond given to dissolve garnishments in the attachment suit. At the November term, 1904, verdict was returned in favor of the plaintiff "for \$250 principal, and \$30.61 interest." During that term a motion for a new trial was filed by the defendants. An order was passed requiring the plaintiff to show cause, on the 15th day of January, 1905, which was during the January term, 1905, why the motion should not be granted. The order also provided that "the movants are granted until the final hearing of this motion, whether the same be had at this or a later term of this court, to present for approval a brief of the evidence in the cause, as well as to amend said motion or the grounds thereof." The motion for a new trial came on for a hearing on January 15, 1905, in term. No brief of evidence was filed by the movants during the November term, 1904, nor had any such brief been filed when the motion was called for hearing. The plaintiff moved to dismiss the motion for a new trial, because of the failure to file a brief of the evidence. This motion was overruled, and the brief of evidence was then presented, approved, and ordered filed. An order was then entered overruling the motion for a new trial. The defendants excepted to this order; and the plaintiff, by cross-bill, excepted to the refusal to dismiss the motion for a new trial because of the failure of the movants to file a brief of the evidence before the hearing.

C. B. Reynolds and Felder & Rountree, for Cross et al.
Walter T. Colquitt and Ben. J. Conyers, contra.

COBB, J. 1. While the Civil Code, § 5484, provides that ordi-

nary motions for new trials must be made during the term at which the trial was had, and that when the term continues longer than thirty days from the trial, "the application shall be filed within thirty days from the trial, together with a brief of the evidence," it is settled by numerous decisions, which need not be cited, that the judge may, by order passed when the motion for new trial is made, extend the time for filing the brief of evidence to any day in the future before the motion is finally heard and determined. The question raised by the motion to dismiss the motion for a new trial in the present case turns upon the construction to be given the words "present for approval a brief of the evidence in the cause." If this language is broad enough to include the right to *file* the brief of evidence, the court properly overruled the motion to dismiss. That the language is broad enough to accomplish this purpose was expressly decided in *Johnson v. Grantham*, 110 Ga. 281. While the language of the order in that case does not appear in the printed report, the original record shows that the language then used was: "Let the brief of evidence be presented for approval on or before the date aforesaid." This was a unanimous decision and is controlling in the present case. See also *Napier v. Heilker*, 115 Ga. 168; *Hightower v. George*, 102 Ga. 549. After a careful examination of the numerous cases dealing with this subject we find none which conflict with those just cited.

2. Complaint is made of the admission of answers to interrogatories, stating that the plaintiff suffered damages in a named sum by reason of the goods being held in stock because of the attachment; the objection being that it was not shown how or in what manner the damage was suffered, or the items thereof, and that it was not competent to prove damages in such general terms. We think the objection was well taken. It was not permissible for the witness to state merely in general terms the amount of damage sustained. He should have given the jury some facts and data from which to estimate the amount of the damage. The testimony objected to was nothing more than a conclusion of the witness as to what damages had been sustained by reason of the goods having been kept in stock after the levy of the attachment. It was the province of the jury to fix the damages from proved facts, and they were not to be controlled by mere conclusions of

witnesses as to this matter. It is said, however, that the objection to the interrogatories was one merely of form, and fell within the spirit of the rule of court with reference to objection to interrogatories on the ground that they were leading (Civil Code, §5668). The rule of court relates entirely to objections of the nature just indicated, and does not embrace, either in letter or spirit, an objection such as the one made in the present case. Besides, the objection was not one merely of form. It was of substance, and raised the objection that the testimony offered was not competent to prove the fact sought to be shown. It is further contended that it has been determined on demurrer that the item of damage referred to in the testimony objected to was legitimate, and that the allegation as to this item in the petition was as general as the testimony offered to support it. Unquestionably the defendants were concluded by the judgment on the demurrer, as to the legality of this item of damage, if this question was made by the demurrer and determined adversely to the defendants. *Ga. Northern Ry. Co. v. Hutchins*, 119 *Ga.* 504. The demurrer is not in the record, and we do not know whether the question was raised and determined on demurrer or not; but conceding that it was, the demurrer adjudicated nothing as to the nature of the proof necessary to establish the allegation. Pleading may be more general than proof. A general averment that the plaintiff had been damaged a named sum would be good against a general demurrer, but the proof should show wherein and how such damage was sustained. It is further contended that as the verdict was for only \$280.15, and the evidence demanded a finding for \$297.15, with the item to which the inadmissible testimony related omitted, the judgment ought not to be reversed. Suffice it to say, with reference to this contention, that the jury were not bound to take the amounts fixed by the witnesses as the damages sustained, but could reduce these amounts, if under all the facts and circumstances they were of opinion this should be done. One of the items in the \$297.15 was \$200 attorney's fees. This amount the jury could have reduced if they thought it unreasonable. *Baker v. Richmond Works*, 105 *Ga.* 225.

3. The other grounds of the motion for a new trial need not be discussed at length. The judge, in referring in his charge to damages for which a recovery could be had, should have stated specif-

ically that they must be damages which were sustained in consequence of the suing out of the attachment. There were some other slight inaccuracies in the charge, but these will no doubt be corrected on another trial. It would be in accordance with the better practice, and on another trial an instruction to that effect should be given, for the jury to return a verdict in an aggregate sum, without itemizing the amount found or stating the processes by which they arrived at it. The plaintiff having put in evidence its answer in the attachment case, it was the right of counsel for the defendants to comment to the jury on the answer and draw from it any legitimate conclusions which would illustrate the issues involved in the case on trial; but it was not error for the court to prevent counsel from discussing parts of the answer which could not possibly throw any light on the issues then involved.

Judgment reversed on main bill, and affirmed on cross-bill of exceptions. All the Justices concur, except Simmons, C. J., absent.

IDLETT v. CITY OF ATLANTA.

1. It is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition so that persons can pass along them in the ordinary methods of travel in safety.
2. If a defect in a sidewalk in a city has existed for such a length of time that by reasonable diligence in the performance of their duties the defect ought to have been known by the proper authorities, notice will be presumed, and proof of actual knowledge will not be necessary in order to render the municipality liable for injuries occasioned thereby.
3. Ordinary diligence on the part of a person passing along a sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it.
4. The allegations of the declaration in this case did not show that the plaintiff could have avoided the injury to herself by the use of ordinary care, and that she failed to exercise such care, so as to authorize a dismissal of the case on demurrer.

Argued June 17, — Decided August 4, 1905.

Action for damages. Before Judge Reid. City court of Atlanta. January 30, 1905.

Celia Idlett brought suit against the City of Atlanta to recover damages on account of a personal injury. She alleged as follows:

123	821
125	61
123	821
128	471

In the sidewalk of one of its public streets there was a hole about six feet long next to the inside of the walk, crescent shaped, and about three feet wide at the widest point, extending from about one half to one third of the way across the pavement. At or near the inner margin of the sidewalk the hole was about two feet deep, but it grew shallower as the center of the walk was approached, and that part of the hole lying furthest from the fence was about ten or twelve inches deep. At this point the street was built up of "made earth," and the brick pavement rested on it. The defective condition of the sidewalk had existed for about six months, and the defendant knew of it, or should have known of it by the exercise of ordinary care. Defendant negligently failed to exercise ordinary care to keep the street and sidewalk in a reasonably safe condition for travel in the ordinary mode by day and night. The leaving of a hole in a public sidewalk in a thickly settled part of the city was gross negligence. The defendant knew that the earth under the bricks was "made earth," and knew or ought to have known that the hole was surrounded by perpendicular walls consisting of "made earth" covered with brick, and that this had a tendency to cave in and fall. It was the duty of the city to fill up the hole, and to repair the street so that caving could not have taken place. The hole was near the plaintiff's house, and she knew of it. She arose early one morning and started along the street to attend to some business. "As petitioner approached said hole she bore to the right, leaving said hole six or eight inches to the left. She was thinking about her business, and at the same time was in a sense conscious of the existence of the hole, and attempted to pass by the widest part of the said hole at least five to ten inches to her left. At other points she was from two to three feet from the hole. The brick that gave way under petitioner's foot was opposite the widest part of the hole. Petitioner was thinking about her work, at the same time she was in some sense conscious of the hole, and walked, as she thought, a sufficient distance from the edge of the hole, to pass by it. She was not especially thinking about the hole, but merely passed around it with her mind on her business, with the subconsciousness of the hole." She is an old negro woman and very ignorant. "It never once occurred to her that the hole would cave in, and she was exercising care at the time she got injured." The nature and extent of the injury were alleged.

The defendant demurred to the declaration, on the following grounds in substance: First, under the allegations of the petition the defendant is not liable; second, it appears that the plaintiff was injured by her own lack of care; third, it appears that the plaintiff well knew of the defect of which she complained, that in full daylight she walked into it, or so near to it as to be injured, and hence she alone was responsible for the injury; and fourth, it does not appear that the city knew, or could have known by the exercise of due care, of the defect. The demurrer was sustained, and the case dismissed. The plaintiff excepted.

O. E. & M. C. Horton, for plaintiff.

James L. Mayson and William P. Hill, for defendant.

LUMPKIN, J. (After stating the facts.) 1-3. It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition, so that persons can pass along them in the ordinary methods of travel in safety. *Bellamy v. Atlanta*, 75 Ga. 167. If a defect in a sidewalk of a municipal corporation has existed for such a length of time that by reasonable diligence in the performance of their duties the defect ought to have been known by the corporate authorities, notice will be presumed, and proof of actual knowledge will not be necessary in order to render the municipality liable for injuries occasioned thereby. *Mayor etc. of Atlanta v. Perdue*, 53 Ga. 607; *Chapman v. Macon*, 55 Ga. 566; *Dempsey v. Rome*, 94 Ga. 420; *City Council of Augusta v. Tharpe*, 113 Ga. 152. Ordinary diligence on the part of a person passing along the sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it. *Wilson v. Atlanta*, 63 Ga. 291, s. c. 59 Ga. 544. Although a municipality may be negligent in permitting a defect to remain in a sidewalk, a traveler must exercise ordinary care under the circumstances. "The fact that a traveler voluntarily attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care; but if he has or ought to have notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of con-

tributory negligence." Elliott on Roads and Streets, § 636. In a note the author says: "Knowledge of the existence of the defect or obstruction is not decisive of the question of contributory fault, but is always an important element to be considered in determining that question, and, indeed, it not unfrequently turns the scale. If the existence of the defect or obstruction is known, and the danger is so great that a man of ordinary prudence would not encounter it, then one who voluntarily attempts to pass it, where there is no reasonable necessity impelling him to make the attempt, may be guilty of such contributory negligence as will bar a recovery." Id. p. 680. It is further said that "The question of contributory negligence is generally for the jury to determine from the circumstances of the case. But where the facts are undisputed and but one reasonable inference can be drawn from them, the question is one of law for the court, and the case may be taken from the jury." Id. § 637. In *Samples v. Atlanta*, 95 Ga. 110, it was said: "Although a traveler may know that because of the defective construction of a public bridge in a city there is some danger in driving over it, still he may recover from the city for injuries sustained in so doing, if it clearly appears that the danger was not obviously of such a character that driving over the bridge would necessarily amount to a want of ordinary and reasonable care and diligence, and if it also appears that in driving over the bridge the plaintiff did in fact observe such care and diligence." In *City of Atlanta v. Martin*, 88 Ga. 21, 22, the plaintiff was walking on a sidewalk when the dirt gave way or crumbled off, and she fell into a ditch between the sidewalk and the street. She testified that "she had been at the place before, but did not know much of its condition; knew it was not a paved street, and not a very good street, but did not know it was so dangerous, or she would not have gone there." She knew that there was a gully there, but did not know the ground was crumbling. "By coming there to church she knew that the gully was by the side of the sidewalk, but did not know the sidewalk was dangerously narrow; never noticed or thought of it" The injury occurred at night. A recovery was sustained. In *Dempsey v. Rome*, 94 Ga. 420, the plaintiff was injured at night by getting his foot caught in a hole which had existed for two weeks or longer in a plank crossing upon one of the streets of the

city. The hole was about ten or fifteen inches long, three inches wide, and two or three inches deep. The plaintiff had observed it a week or two before he was injured, and at the time he stepped into it he "had his hands in his pants pockets, was walking very peart, and wasn't paying any attention." It was held to be a question for the jury whether under these circumstances he was negligent in not thinking of the defect, looking out for it, and taking care for his own safety. In *Mayor etc. of Jackson v. Boone*, 93 Ga. 662, where the plaintiff leaned against a gate forming part of a railing protecting an excavation in and along the margin of a public sidewalk in a town, and the gate fell, it was held that "There was no error in declining to charge the jury that if the plaintiff intentionally leaned upon the gate, he could not recover from the municipal corporation; or in instructing the jury that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate in question." Applying these principles to the case at bar, it was alleged that the defective condition of the sidewalk had existed for about six months, and the defendant knew of it, or by the exercise of ordinary care must have ascertained it. If the existence of a hole in a public street was sufficient to make the case one for submission to a jury on the question of negligence by the city authorities in having and leaving a crossing in that condition, as was held in the case of *Dempsey v. Rome*, supra, certainly the existence, for at least six months, of a hole extending from a third to half way across a public sidewalk and averaging in depth from two feet to ten inches, would be sufficient to authorize the submission of a similar issue to the jury.

4. The remaining grounds of the demurrer as argued make a single point, namely: Did the declaration show that the plaintiff could have avoided the injury to herself by the use of ordinary care, so as to prevent a recovery? Again we apply the principles in the cases above cited to the facts of the present case as alleged in the declaration. According to the allegations, the plaintiff was passing along a public sidewalk which the municipal authorities had left in the same condition for six months or more, as one of its sidewalks for use by the public. Her mind was occupied with her business, but she was conscious of the existence of the hole, and endeavored to pass safely around it, and she thought she had walked a sufficient distance from the edge of the

hole to pass it in safety. At the widest point of the hole she passed it at a distance of from five to ten inches. She alleged that it never occurred to her that the earth would cave in, and that she was exercising care at the time of the injury. In the face of these allegations, which the demurrer admits, we are unable to hold as matter of law that the conduct of the plaintiff so clearly amounted to a want of ordinary care as to make the declaration demurrable. As said in the case of *Wilson v. Atlanta*, 63 Ga. 291, supra, while the city and the passer are both required to exercise ordinary diligence, the duty of keeping its streets and sidewalks in repair rests upon the city, and therefore ordinary diligence on its part and ordinary diligence on the part of one who passes along a sidewalk do not imply a like degree of diligence in foreseeing danger and guarding against it. The argument, therefore, that if the city could have known of the danger of this defective sidewalk, the plaintiff also could have known of it, is not sound. On the face of the declaration there is nothing to show that the place where the plaintiff stepped was clearly and apparently dangerous, or that in passing along a public sidewalk to step so near to a hole was necessarily a want of ordinary care on her part. Nor can we say from the face of the declaration that an ordinarily prudent person would not have approached so near to the hole. This case, therefore, does not fall within the ruling made in *City of Columbus v. Griggs*, 113 Ga. 597, where it affirmatively appeared from the evidence "that it was palpably and obviously dangerous to attempt to drive at night over that place in the street at which the injury occurred;" and that Griggs "with full and accurate knowledge of this fact, voluntarily, on a dark night, accompanied by another, who had like knowledge, in a buggy with the latter undertook to drive over that place;" and that "they actually discussed it but a few moments before the catastrophe happened." Nor is the case controlled by that of *Sheats v. Rome*, 92 Ga. 535, where the municipality was negligent in causing a ditch five feet wide and three or four feet deep to be cut across a public sidewalk and left open for several weeks, but where the plaintiff, a female, was perfectly aware of the existence, width, and depth of the ditch, and either attempted to jump across it or stepped into the bottom of it on a rock and tried to step out, and was thus injured. Clearly in such a case she had no cause of action. In the case of *Kent*

v. Southern Bell Telephone Co., 120 Ga. 980, is discussed the risk which one assumes in attempting to cross over a ditch, and also the fact that he does not assume the danger occasioned by latent and unknown defects. In the present case the plaintiff, according to her allegations, was not seeking to cross over a ditch, excavation, or hole, but was passing along a public sidewalk, left open by the municipal authorities for public passage, and was seeking to go around or avoid the hole which the city had permitted to remain there. It can not be said with certainty, from the declaration, that she failed to use ordinary care, and that had she done so the injury would not have occurred. Whatever may appear to be the facts when the evidence is introduced, the declaration should not have been dismissed on demurrer.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent.

LAMAR *v.* LAMAR.

A writ of ne exeat may be granted in this State at the instance of a wife against her husband, pending an application for alimony, and prior to any decree therefor. The court, in determining the amount of bond to be required, will exercise a sound discretion under the special circumstances of the case, having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion.

Submitted June 28, — Decided August 4, 1905.

Ne exeat. Before Judge Pendleton. Fulton superior court. May 25, 1905.

L. L. Lamar brought suit against her husband, Rufus Lamar, for permanent alimony, and made application for temporary alimony. She also prayed the superior court for a writ of ne exeat, alleging that her husband was receiving a good income from his labor, amounting to about twenty dollars per month; that he had abandoned her by forcing her to leave his place of residence without cause; that she was without means of support; and that he was preparing and threatening to leave the State to avoid supporting her and their minor child. The application was duly verified, and the writ issued under the order of the judge. A motion was made to dismiss it, which was refused, and the defendant excepted.

Winfield Jones, for plaintiff in error. *S. C. Crane*, contra.

LUMPKIN, J. Under the English practice the writ of *ne exeat regno* was a prerogative writ which issued to prevent a person from leaving the realm. In America it has been treated, not as a prerogative writ, but as a writ of right in the cases in which it is properly grantable. In regard to alimony the practice of granting the writ has sometimes been said to have arisen from compassion, and because the ecclesiastical courts could not take bail. But the truer ground on which equitable interference arose would seem to be, that, although alimony was not strictly an equitable debt, yet the ecclesiastical courts were unable to furnish a complete remedy to enforce the duty of payment thereof; and therefore courts of equity ought to interfere to prevent the decree from being defeated by fraud. 2 Story's Eq. Jur. (13th ed.) §§ 1465, 1469, 1471, 1472. As to whether the writ will be issued in cases of alimony until after alimony has been decreed, there has been some diversity of opinion. In New York, where the jurisdiction as to divorce and alimony was vested in the court of chancery, it was held by Chancellor Kent that he would *pendente lite* grant the writ of *ne exeat republica* against the husband, upon proper application. *Denton v. Denton*, 1 John. Ch. 364, 441. On the other hand, in Michigan, it was held that this would not be done. *Bailey v. Cadwell*, 51 Mich. 217. In 1813 an act of the legislature was passed in this State, which, among other things, declared that "The judges of the superior courts shall, and they are hereby authorized to grant writs of *ne exeat*, as well in cases where the debt or demand is not actually due, but exists fairly and bona fide in expectancy at the time of making application, as in cases where the demand is due." Cobb's Dig. 525. In *McGee v. McGee*, 8 Ga. 295, it was held: "A writ of *ne exeat* may be granted in this State, prior to any decree for alimony. The court, in marking the writ, will exercise a sound discretion, under the special circumstances of the case,—having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion." This decision cited approvingly, and to a considerable extent followed, the decision of Chancellor Kent in *Denton v. Denton*, *supra*; so that this court at an early date appears to have adopted this view rather than that since announced by the Supreme Court of Michigan. The fact that the amount of ali-

mony had not been fixed by decree was not considered an insuperable objection, as the court could use a sound discretion in fixing the bond, or "marking the writ."

In *McGee v. Polk*, 24 Ga. 406, 411, it was said: "In bills for account and administration of assets, no certain balance need be sworn to, to entitle the complainants to the writ of ne exeat. It is sufficient if there is a clear affidavit of assets received." When the laws of this State were first codified in 1863, the grounds for the writ were stated in section 3147. It declared that "The writ of ne exeat issues to restrain a person from leaving the jurisdiction of the State, and may be granted in the following cases: 1. At the instance of a creditor whose debt is not due, or where, from some other cause, the ordinary process is not available or sufficient against his debtor, or against a third person secondarily or otherwise under any circumstances chargeable with the debt;" after which follow several other grounds for the issuance of the writ. Subsection 1, just quoted, was carried forward into the Code of 1868, where it formed a part of section 3159. In the Code of 1873 the grounds for the issuance of the writ are stated in section 3226. In that section item 1 of section 3159 of the previous code was omitted by the codifiers, on the ground that by the constitution of 1868 (article 1, par. 18) it was declared that there should be no imprisonment for debt. And this constitutional declaration has been continued in the constitution of 1877 (article 1, sec. 21). This provision unquestionably prevents imprisonment for a mere ordinary debt, and the writ of ne exeat can not be used for that purpose. But alimony does not rank as a mere debt. A husband can be directed to pay alimony, and for a failure or refusal to comply with the order he may be imprisoned; and this has been held not to conflict with the constitutional provision above cited. *Carlton v. Carlton*, 44 Ga. 216; *Lewis v. Lewis*, 80 Ga. 706. The striking of the first item of this section of the Code of 1863, referring to the writ of ne exeat, did not have the effect to restore the English rule that the claim must be due or reduced to judgment, if the case were one where the writ was properly grantable, and if that rule applied to alimony.

The question involved in the present case, however, is not left dependent upon reasoning or construction, but is practically de-

cided in the case of *Gibson v. Patterson*, 75 Ga. 549, where it was said: "Where a bill was filed in aid of a libel for divorce, and the principal purpose of it was to secure the wife's alimony, with proper allegations and proof, the chancellor would have authority to order the arrest of the defendant, and to require him to give bond and security for his compliance with any order that he might grant in the divorce case then pending, for the payment of alimony to his wife." In 1870 an act was passed which authorized a suit for alimony in cases where the husband and wife were living separately or were in a bona fide state of separation, and no action for divorce was pending. The proceeding provided for in this act was an equitable one, and authorized the judge to grant such order as he might grant if the application were based on a pending libel for divorce, "to be enforced in the same manner, together with any other remedy applicable in a court of equity." Acts 1870, p. 413; Civil Code, § 2467. An application for temporary alimony under this section is to be based on an application for permanent alimony. *Yeomans v. Yeomans*, 77 Ga. 124. The rulings in regard to alimony pending divorce, and the issuing of a writ of ne exeat, apply as well to this case as to one where an application for divorce is pending.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

COLLINSVILLE GRANITE COMPANY v. PHILLIPS, and
vice versa.

1. That the plaintiff in error did not specify his exceptions to the auditor's report as part of the record to be certified by the clerk and transmitted to this court, but incorporated the exceptions in his bill of exceptions, assigning error separately upon the ruling of the court overruling each of the exceptions to the auditor's report, is no ground for dismissing the writ of error.
2. The bill of exceptions of the Collinsville Granite Company is not open to the objection that it is argumentative and does not assign error with sufficient clearness and definiteness.
3. If an auditor to whom a case has been referred fails to embody in his report a statement of fact material to the case on trial, the remedy of the party injured by this failure is to ask for an order recommitting the report, that the omission may be supplied. The error can not be attacked by an "exception of law as to matter not appearing on the face of the record."

123	830
124	164
124	172
123	830
126	345

123	830
129	274
129	380

4. While the original petition did not pray for a judgment for *mesne profits*, one of the amendments thereto contained the equivalent of such a prayer; and there was evidence to warrant the finding of the auditor on this subject.
5. Where a deed made by an administrator recited the authority given by the ordinary of the county to sell at public outcry the land covered by the deed, "with the exception of all the granite on said lot of land," but in the granting clause failed to make reference to the granite, it will be presumed that the administrator did not undertake to exceed his authority, and that there was no intention to pass title to the granite.
6. Where the habendum clause in a deed contained an exception which was not referred to in the granting clause, the exception was not void for repugnancy, if it clearly appears that it was the intention of the parties to make such exception.
7. Where the ownership of the surface of land and that of the minerals on the land are in different persons, the owner of the surface has an implied right to support, either natural or artificial, for his land.
8. It is possible for one to own the title to minerals and yet not have the right to take possession of his property. Thus, where the ownership of the surface and the mineral interest are in different persons, and the mineral is of such a character that it can only be worked from above, after removing the surface soil (e. g., granite), the owner of the minerals has no right to remove his property until it has become exposed by the removal of the soil.
9. A deed conveyed realty, "with the exception of all the granite on said lot of land." *Held*, that the owner of the granite had title to all of that mineral on the land; not merely that which was exposed at the time the deed was made. This was so regardless of his right to disturb the soil for the purpose of removing the granite. When, from the washing away of the soil or from other causes, other granite became exposed, he had the right to remove it.
10. When the plaintiff in an action of "complaint for land" files amendments, which are allowed, praying equitable relief in aid of his petition, and such petition as amended is duly answered, the proceeding is converted into an equity case; so that when the same is referred to an auditor, exceptions of fact to his report need not be submitted to a jury unless the judge approves them, and whether they shall be approved is a matter addressed to the sound discretion of the judge.
11. Where a deed described the property conveyed as containing ninety acres, more or less, and being the north half of a designated lot of land, and it appeared that the land lot in question contained more than two hundred acres, the description by the number of acres should give way to that by the subdivision of the land lot.
12. A security deed can not be the foundation upon which to begin a prescription by seven years possession under color of title, so long as the possession of the premises is not surrendered to the grantee therein, but still remains in the grantor.
13. When the grantor in a deed describes the property which he therein conveys as all of his interest, as heir at law of another, in described land, the deed is admissible in evidence in favor of one claiming to derive title to the land from him. What the grantor's interest in the land, if any, was at the time

the deed was executed may be shown by other evidence, the value of the deed as evidence of title depending upon proof of such interest.

14. Where the description of the property conveyed in a deed is "one fourth interest" in a definitely described lot of land, the description is not "so vague, indefinite as to be void," but is an accurate description of a fractional interest in land.
15. One may show title to a mineral interest in land by showing an unrestricted title to the land wherein the mineral is contained.
16. An exception of law to an auditor's report does not properly present any question for determination by the court, when it complains of the admission or the rejection of evidence, whether the same be oral or documentary, and fails to disclose upon its face, or by an exhibit attached to the exception and referred to therein, what the substance of such evidence was, or to point out where in the auditor's brief of evidence the same may be found. The same rule obtains, in an equity case, in reference to an exception of law or of fact to a finding of the auditor which involves a consideration of the evidence upon which such finding was based. *Armstrong v. Winter*, 122 Ga. 869, and cit.; *First State Bank v. Avera*, ante, 598.
17. Where in a suit for the recovery of realty the plaintiff relies on a receiver's deed as a link in his chain of title, the fact that the defendant in the case on trial was no party to the action which resulted in the decree under which the receiver sold the property affords no ground for excluding the deed from evidence.
18. Where the receiver sold such realty under and by direction of a consent decree, as the property of the parties to the cause wherein such decree was rendered, the fact that he was not, at the time of the sale, in possession of all of such property would not render such deed inadmissible in evidence.
19. The fact that an administrator bid off the property at the receiver's sale and that it was sold, in part, as the property of his intestate's estate, did not render the sale and the deed made in pursuance thereof void, and such deed when offered in evidence in the ejectment suit could not be collaterally attacked on this ground by the defendant.
20. Where the question at issue was, who owned the granite interest in a certain lot of land, it was not competent for a witness to testify that granite quarried on this lot belonged to the party who had quarried it.
21. An exception to the admission of testimony which was objected to by the exceptor presents no question for determination, when it fails to disclose what the testimony admitted was, but merely gives the question propounded to the witness.
22. Where the ground of an exception to the admission of the answer of a witness can not be understood from the exception itself, but is so vague and uncertain that it can not be comprehended without searching through the brief of evidence for light upon the subject, it presents no question for the court's determination.
23. An affidavit made by one under whom the defendant claimed, while such person was in possession of the land, wherein he admitted that he did not own the "rock or granite" interest therein, was not inadmissible in evidence because the affiant was dead, nor because it was an affidavit used in previous litigation concerning the property to which the defendant in the case on trial was not a party.

24. Where a party to an action of the present character requests the auditor to whom the case has been referred to personally visit and inspect the premises in dispute, he can not afterwards object to the impression produced on the mind of the auditor by such inspection.
25. A mere statement by the auditor that "this personal inspection had considerable influence on the mind of the auditor in arriving at the conclusion and recommendation he hereinafter makes," and that, "in his opinion, much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted," is not a finding by the auditor and can not be excepted to as such.
26. Where the auditor found a particular portion of the premises in dispute in favor of the plaintiff and described it by metes and bounds, an exception to such finding upon the ground that "one of his boundary lines is indefinite, uncertain, and impossible to locate," without indicating which boundary line is referred to, is not properly made.
27. In this suit, only the "exposed granite" could be recovered by the plaintiff. Land whereon the granite was not exposed could not be recovered, even though it was not suitable for cultivation.
28. It is not ground for exception to a decree rendered upon the report of an auditor, that the amount of the recovery in favor of the plaintiff therein is less than the evidence before the auditor authorized.
29. When, in a case of this character the court, upon the prayer of the plaintiff, enjoins the defendant, from quarrying stone upon the property awarded by the decree to the plaintiff, it is not error to also enjoin the plaintiff from interfering with the property therein awarded to the defendant.

Argued February 10,—Decided August 5, 1905.

Equitable petition. Before Judge Roan. DeKalb superior court. June 4, 1904.

DuBignon & Alston and *C. W. Smith*, for plaintiff.

Thomas F. Corrigan, Bishop & Ripley, and *D. P. Phillips*, for defendant.

FISH, P. J. The Collinsville Granite Company brought an action, in the form of "complaint for land," against R. O. Phillips, to recover "all of the exposed granite upon one hundred and twenty-three acres of land, more or less, in land lot one hundred and eighty-four of the sixteenth district of DeKalb county, Georgia," which was described with particularity in the petition. Two amendments to the petition were allowed, both of which invoked the equitable powers of the court. In one it was alleged that Phillips did not own or hold title to the property in dispute, but was tenant in possession under a bond for title from one G. W. Johnson; that the deeds under which the defendant claimed expressly stipulated that the exposed granite was reserved from

the conveyances; that Phillips was mining stone upon the property, and extending his operations to other quarries which had not theretofore been opened; that he was insolvent, and the plaintiff was on that account without redress for the waste that would be committed; and an injunction was prayed to restrain the defendant or his agents from quarrying stone on the property. The other amendment prayed for an accounting for the stone already quarried by Phillips, and also that a receiver be appointed to take charge of the property, or to take account of the income and of the stone quarried; and that the plaintiff have judgment for the value of the stone thus removed by Phillips. In pursuance of the prayers of these amendments, or ancillary petitions, temporary restraining orders were granted, but these were subsequently modified by an order granting leave to the defendant to operate the quarries until the final hearing of the petition, provided he should give bond with security to indemnify the plaintiff for any damage to the property by reason of his use of it. The defendant gave the bond required, and continued in possession of the property. The answer of the defendant denied the material allegations of the petition, and claimed that he was entitled to possession of the property sued for, under a bond for title from one Johnson. It was also denied that the deeds under which the defendant claimed contained any reservation of the exposed granite on the property conveyed. The case was referred to an auditor, who duly reported his findings to the court. Both the plaintiff and the defendant filed exceptions of law and of fact to the auditor's report; but all exceptions were overruled, and a decree was framed substantially following the report. Both parties excepted to the decree, and the case is now before this court for review.

1, 2. A motion was made by Phillips to dismiss the writ of error sued out by the Collinsville Granite Company, on the grounds (1, 2) that the bill of exceptions did not specify the exceptions of law and fact, the overruling of which was assigned as error, as part of the record to be sent to this court, the exceptions being incorporated in the bill of exceptions and error assigned on them separately; (3) that the bill of exceptions is argumentative, and not confined to the errors complained of. We know of no reason why a plaintiff in error may not, if he sees fit,

bring exceptions to an auditor's report to this court in his bill of exceptions rather than in the transcript of the record, so long as they are duly certified by the trial judge who overruled them. While the practice of bringing exceptions to an auditor's report to this court in a bill of exceptions, instead of specifying them as part of the record to be transmitted by the clerk of the court below, may be open to objection, the writ of error will not be dismissed on this account. This question is settled, in principle, by the decision in *Burkhalter v. Oliver*, 88 Ga. 473, where this court declined to dismiss a writ of error on the ground that the different grounds of the motion for a new trial were set out in the bill of exceptions and error assigned thereon separately, the motion not being brought up in the transcript of the record. Nor is there any merit in the ground that the bill of exceptions is argumentative. Every bill of exceptions should be argumentative to the extent of setting out the reasons why the judgment or ruling complained of is alleged to be erroneous. The bill of exceptions now under discussion came up to the full requirements of the law in the clearness and definiteness with which error was assigned; and the writ of error will not be dismissed.

3. The bill of exceptions filed by Phillips complains that the court erred in overruling his exceptions of law and of fact to the auditor's report, and in rendering judgment for the plaintiff for mesne profits. The exceptions of law were twenty-five in number. One of these purports to be an exception "as to matter not appearing on the face of the record," and complains that the auditor erred in not stating in his report that the plaintiff made an admission in judico which was alleged to have had a material bearing on the case on trial. We know of no rule of law permitting a party to except in this manner to the failure of the auditor to embody material statements in his report. Exceptions should go to what the auditor reported, not to what he did not report. This is so for the very excellent reason that in the absence of a report from the auditor the court has no way of ascertaining whether the matter complained of is true or not. If, indeed, the auditor's report was not full enough, the defendant should have prayed the court for an order recommitting the report, so that the alleged omissions could have been supplied in the regular and legal manner. Civil Code, § 4593.

4. The assignment of error complaining of the judgment for mesne profits does not complain that the amount allowed by the court was incorrect or was arrived at in an erroneous manner, but merely that there was no evidence to authorize any judgment for mesne profits at all, and that such a judgment was not warranted by the pleadings. This contention is without merit. While the original petition did not pray in express terms for a judgment for mesne profits, one of the amendments thereto contained a prayer on which such a judgment could be based, viz.: that plaintiff have judgment for the value of the stone which defendant had quarried from the land. *Cunningham v. Morris*, 19 Ga. 583. The report of the auditor affirmatively shows that ample evidence was introduced to warrant a finding for mesne profits.

5, 6. Two deeds were introduced by the plaintiff, neither of which formed any part of its chain of title, but each of which the plaintiff claimed was a part of the chain of title under which the defendant held. They were evidently introduced for the purpose of showing that W. H. Braswell, under whom the defendant claimed, never acquired any title to the granite in dispute, and, therefore, those who derived title through him never acquired any title to such granite. How the plaintiff obtained possession of these deeds does not appear. They do not appear to have been produced on the trial by the defendant, under notice served upon him for this purpose. The question whether the plaintiff could, by the introduction of these deeds, show that as the defendant claimed under Braswell he must also claim under the grantors in these deeds, does not appear to have been made at any stage of the case; but the case seems to have been tried on the theory, apparently acquiesced in, or not contested, by the defendant, that whatever paper title the defendant had was derived from the grantors in these conveyances; and in the brief of his counsel filed in this court it is admitted that these grantors were his predecessors in title. As we shall presently see, each of these deeds purported to convey the land therein described, with the exception of the granite. The proper legal construction of these two deeds was considered by the auditor to be the main and controlling question in the case, and neither party was satisfied with the construction which he placed upon them in his findings of law, and hence each party filed exceptions of law to such

findings. The first of these deeds, in point of time, was from White, administrator of Boyd, to Wheeler. It was executed in 1854, and recited that it was made by virtue of an order of the court of ordinary of Newton county, granting leave to the administrator to sell, as the property of his decedent, "lot one hundred and eighty-four in the sixteenth district of originally Henry, now DeKalb county, containing two hundred and two and one half acres, with the rights, members, and appurtenances thereunto belonging, with the exception of all the granite on said lot of land, the right of way to the Georgia Railroad, and the widow's dower." The granting clause of the deed was as follows: "The said David T. White, administrator as aforesaid, hath granted, . . unto the said Simeon Wheeler, his heirs, executors, administrators, and assigns, the said parcel of land, with all the rights, members, and appurtenances thereunto belonging, unto the said Simeon Wheeler, or any wise appertaining, to his heirs, executors, administrators, and assigns, to his and their own proper use, benefit, and behoof." Subsequently Wheeler executed a deed to Braswell, which, in the granting clause, undertook to convey to the grantee ninety acres of land lot 184 in DeKalb county, but in the habendum clause excepted "the granite on said lot." The auditor held that under these deeds "all the arable and all the cultivatable land passed to the grantees therein mentioned, but that the exposed granite on this lot of land was reserved to the grantors, their heirs and assigns;" but he also expressly ruled: "that the true intention and meaning of the parties was to reserve only such granite as was exposed at that time. For it appears from the evidence that underlying all of the soil on said lot of land is a foundation of granite capable of being quarried. It appears to the auditor that it could not have been within the intention of the parties to these deeds, notwithstanding the language used in these deeds, to attempt to reserve the support and foundation of the cultivatable soil conveyed. . . To say the least of it, the plaintiff in the case at bar can not complain at this construction, because in the declaration filed the plaintiff only sued for 'the exposed granite' on this land lot." Contrary to the auditor's expectations, however, the plaintiff did, as we have already stated, complain of his construction of the deeds, contending that its suit was for the granite which was ex-

posed at the time of the commencement of the action, and not when the deeds were executed; and further contending that the deeds conveyed to the grantees no interest whatever in the granite on the land. The defendant was equally dissatisfied, insisting that the exceptions in the deeds were void for vagueness and for repugnance to the granting clauses.

We are clear that there is no merit in the contention of the defendant that the exception of the granite in the deeds referred to was void for inconsistency, and that the deeds passed title to the entire interest in the land, including the granite. "The strictness of the ancient rule as to repugnancy in deeds is much relaxed, so that in this, as in other cases of construction, if clauses or parts are conflicting or repugnant, the intention is gathered from the whole instrument." 13 Cyc. 618. See also Civil Code, § 3673; *Thurmond v. Thurmond*, 88 Ga. 182; *Bray v. McGinty*, 94 Ga. 192; *Rollins v. Davis*, 96 Ga. 107; *Henderson v. Sawyer*, 99 Ga. 234. It was clearly the intention of the grantors in the deeds from White, administrator, to Wheeler, and from Wheeler to Braswell, not to convey certain granite on the land (whether the exception extended to all the granite or only to that which was at the time exposed will be considered later); and that intention will not be defeated by the failure of the person who drew the instrument to make the exception specifically in the granting clause of the deed. In the deed from White to Wheeler, the instrument recited that it was made in pursuance of an order of the court of ordinary of Newton county, and that the authority granted by that order did not extend to the granite on the land. In the face of this recital it can not be assumed that the grantor intended to exceed his authority and convey more than he was entitled to convey. And the deed from Wheeler to Braswell, read in connection with that from White to Wheeler, leaves no doubt that it was the intention of the parties, that title to the granite should not pass.

7-9. The deed from White, administrator, to Wheeler conveyed land lot 184, "with the exception of all the granite on said lot of land," the widow's dower, and the right of way of the Georgia Railroad. That from Wheeler to Braswell conveyed ninety acres of land lot 184, "with the exception of the granite on said lot." It would seem, at first glance, that these deeds passed no

title to any of the granite on the land which they covered. It appeared, however, that underlying all of the soil on this land lot was a foundation of granite, capable of being quarried; and the auditor therefore held that it was the intention of the grantors to except or reserve only that granite which was exposed at the time the deeds were made. We can not agree with this construction. It is true that it appeared that in quarrying granite it was necessary to remove the covering soil, and that it was impossible to mine it from beneath the ground like other minerals; and therefore that if the rights of the owner of the soil were subordinated to those of the owner of the granite, the result would be practically, to deprive the former of all that he was supposed to get under his deed. "Where one grants the surface of land and reserves the minerals, or grants the surface to one and the minerals to another, an implied right to support of the surface passes with the grant of the surface. This does not mean that all of the mineral does not belong to the mineral owner, but that he can not get it out without leaving a sufficient support, natural or artificial, for the surface." 18 Am. & Eng. Enc. L. (2d ed.) 556-557. See also the opinion of Lord Campbell in *Smart v. Morton*, 85 E. C. L. 30. It would seem, then, that in the case of granite, where it is impossible to remove the mineral without disturbing the surface soil and completely destroying the benefits accruing to the owner of the surface, if the ownership of the mineral is in one person and that of the surface in another, the former could only exercise his rights in taking out such granite as was exposed, from one cause or another, by the removal of the surface soil. But it must be borne in mind that no part of the granite passed to the grantees in the deeds now under construction. If the grantor in the first of these deeds had title to the granite, it remained in him, though he may not have had the right to take possession of his property. If he had title to the granite, he owned the entire granite interest in the lot, not merely that which was exposed at the time the deed was executed; and when for any cause other granite became exposed, it was his right to quarry it. The auditor, in his report, states that he is confirmed in his opinion that the deed being construed excepted only the granite that was exposed at the time, by reason of the verdict and decree in certain litigation over the title

to this property in the year 1888, which constituted a part of the plaintiff's chain of title. We have carefully examined the verdict and decree referred to, and have been unable to arrive at the same conclusion in regard thereto as did the auditor. From the abstract of the record in that litigation, appearing in the brief of evidence in the present case, it appears that "the jury found as follows: The title to the property in dispute, to wit, the exposed granite on land lot 184 in the 16th district of originally Henry, now DeKalb county, Georgia, shall, and it is then, and is hereby confirmed as follows." Then follows the finding of the jury as to the parties entitled to the possession; and it further appears that "on that verdict decree was entered in accordance therewith." The term "exposed granite" is used in the verdict, and presumably the decree settled the title, as between the parties to that litigation, to the "exposed granite;" but we see no reason to conclude, on this account, that a deed made in 1854, conveying described land, "with the exception of all the granite on said lot of land," conveyed to the grantee the land except only that granite which was exposed in 1854. If we are correct in the view that none of the granite on land lot 184 passed under the deed from White, administrator, to Wheeler, and if the Collinsville Granite Company now has title to all the granite, exposed or concealed, regardless of its right to remove that granite, it follows that its suit in 1902 for the exposed granite on the land should not be construed as an action for the granite which was exposed in 1854, but as an action for the recovery of the granite exposed at the time the suit was brought.

10. Complaint is made by the defendant that the court erred in overruling his exceptions of fact to the auditor's report, without submitting the issues of fact raised thereby to a jury. The case, in its inception, was one at law, but the amendments filed by the plaintiff to its petition, which were allowed and answered, invoked the equitable relief of injunction, accounting, and receiver, in aid of the common-law relief sought in the original petition. It is true that no injunction was granted or receiver appointed, but, in lieu of an injunction and receiver, the court required the defendant to give bond to indemnify the plaintiff against the alleged threatened injury which the equitable amendments sought to prevent. The cause of action was thus con-

verted from a legal into an equitable one, and it was not necessary for the court to submit the exceptions of fact to the auditor's report to a jury, unless they were approved; and whether they should be approved was in the discretion of the judge. *Austin v. Southern Home Building & Loan Asso.*, 122 Ga. 439.

11. The auditor in his report held that there were but three controlling questions for his decision, viz, (1) the construction to be given the deeds from White, administrator, to Wheeler, and from Wheeler to Braswell; (2) what part of the property sued for was covered by those deeds; and (3) what granite was exposed on the 90 acres of land conveyed by the deed from Wheeler to Braswell. In view of the ruling that we have made on the first of these questions, it is apparent that the third is immaterial; for if the deeds did not convey any of the granite on the land, it makes no difference, so far as this discussion is concerned, what granite was exposed when those deeds were made, or whether any was exposed. This question, therefore, will not be considered. There is no difficulty in determining what land was conveyed by the deed from White, administrator, to Wheeler. All of land lot 184, except the granite, the right of way of the Georgia Railroad, and the widow's dower, was embraced in that deed. The deed from Wheeler to Braswell conveyed "all that tract or parcel of land situate, lying, and being in the sixteenth district of DeKalb county, it being part of lot of land number one hundred and eighty-four, containing ninety acres, more or less, and being the north half of said lot of land." As land lot 184 contained two hundred and two and one half acres, it is apparent that a description of the north half of the lot as containing only ninety acres is contradictory, and it becomes necessary to determine whether the description by the number of acres or by the designation of the fractional part of the land lot is to prevail. The auditor held that the deed conveyed land bounded as follows: "The original land-lot lines on the north, east, and west, and the made line running parallel to the original north land-lot line and dividing the land lot into two equal portions." We find no error in this ruling. "If recitals in a deed are inconsistent or repugnant, the first recital does not necessarily prevail over the latter, but the whole language of the deed is to be construed together in order that the true construction may be ascertained. In such

a case the court will look into the surrounding facts, and will adopt that construction which is the most definite and certain, and which will carry out the evident intention of the parties." 13 Cyc. 627. "In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contains so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it can not control the rest of the description." 2 Devlin on Deeds (2d ed.), § 1044. These authorities leave no doubt as to the correctness of the auditor's decision that the description by number of acres must give way to the more definite description, "being the north half of said lot of land."

12. In January, 1888, W. H. Braswell, the grantee in the deed from Wheeler, in order to secure a debt for borrowed money, executed to the Equitable Mortgage Company a deed to the one hundred and twenty-three acres of land lot 184 claimed by the defendant including the "ninety acres" which the grantor had acquired from Simeon Wheeler, the granite in the land not being excepted from the security deed. Contemporaneously with the execution of this deed, the mortgage company executed its bond to reconvey the property to the grantor upon the payment of the debt. The debt was not paid when due, and in 1897 the security deed was foreclosed and the property sold at public outcry to one Preston. He sold it to the Equitable Securities Company, and that company sold it to Johnson, under whom the defendant holds, under a bond for title to the land, including the granite. The defendant introduced the deed from Braswell to the Equitable Mortgage Company. The plaintiff objected to the admissibility of this deed, except for certain limited purposes. The auditor held that the deed was admissible as one of the links in the defendant's chain of title, but was not admissible to show color of title from its date, upon which to base a prescription in favor of the defendant, because the possession of the property was not surrendered to the grantee when the deed was executed, but re-

mained in the grantor. To this ruling of the auditor the defendant excepted. The ruling of the auditor was clearly right. This deed could not be color of title in the mortgage company, for it did not go into possession of the land under the deed. This deed could not be color of title in Braswell, for it purported to convey title out of, and not into, him; and besides he could not hold under color of title from himself.

13. There was no error on the part of the auditor in admitting in evidence certain deeds, offered by the plaintiff, from parties claiming to be the heirs at law of James F. Seavey to Lemuel P. Grant. Each of these deeds was objected to by the defendant upon the ground "that the suit was for exposed granite on 123 acres of land lot 184, and the description of the deed is 'all of the interest of the heirs in land lot 184,' it being contended that the description is vague and the deed conveys nothing;" and upon the further ground that "the description of the interest sought to be conveyed is different from the subject-matter of the suit at bar." There was no merit in either of these objections. The plaintiff had already introduced, as a part of its chain of title, a deed from Alexander Pharr to James F. Seavey, and sought by these deeds to show title out of Seavey, through his heirs at law, into Grant, as another link in its chain. The deeds clearly described the lot of land to which they referred, and they conveyed all the interest of the grantors therein. This was sufficient so far as the admissibility of the deeds in evidence was concerned. Whether the grantors were the heirs at law of James F. Seavey or not, and, if so, what their respective interests in the land were, could be shown by other evidence. When one conveys all his interest in described land, his interest therein, whatever it may be, passes; and the deed is admissible in evidence for the purpose of showing this. What his interest in the land was, at the time the deed was executed, may be shown by other evidence, the value of the deed as evidence upon a question of title depending upon proof of such interest.

14, 15. Certain deeds purporting to convey definitely defined interests in this lot of land, such as "one fourth interest" and "one sixteenth interest," were objected to by the defendant upon the ground that the description was "so vague and indefinite as to be void," which objection the auditor properly overruled, as there

was not even the semblance of merit in it. We do not see how the description of a fractional interest in land could have been more accurate. Another objection to the admissibility of these deeds was, that they purported to convey described interests in the land, while the defendant was sued only for the exposed granite in the land. As the greater includes the less, the plaintiff could show title to the granite by showing an unrestricted title to the land which contained it.

16. There are a number of exceptions, some of law and some of fact, filed by the respective parties in this case, which can not be considered, for the reasons stated in the sixteenth headnote, which needs no discussion or elaboration. All of the defendant's exceptions of fact fall within the rule there laid down, save perhaps one, wherein it was alleged that there was no evidence to support a certain finding of the auditor, and this one was properly disapproved because there was such evidence. The plaintiff's exceptions of fact were few, and most of them presented questions made in its exceptions of law which are dealt with in this opinion; the others are disposed of in the headnote mentioned above.

17-19. The plaintiff introduced a certified copy of the entire record in an equitable action brought by Thomas J. Wesley, as administrator of Lemuel P. Grant, under whom the plaintiff claimed, against various parties, in which equitable proceeding the plaintiff claimed that his intestate owned an undivided one-half interest in the exposed granite on this lot of land; that certain of the defendants claimed to own different interests in this granite, while others set up claims as lessees thereof; that there was pending litigation between some of the parties in reference to the property, etc. The petitioner prayed that the interests of the different parties in the property be ascertained and settled; and that pending the proceeding the other litigation referred to be enjoined, and all the defendants be enjoined from quarrying granite upon this lot. By consent of all the parties to the case, a receiver for the property was appointed and authorized to collect the rents, etc., and the case was referred to an auditor. The auditor made his report, the findings therein being made by the consent and agreement of all the parties. He found how the title was to be decreed to be vested, finding different specific fractional interests therein in favor of various parties. It was adjudged that

the property could not be divided in kind and should be sold by the receiver. Upon consent of all the parties, the findings of the auditor were confirmed, and the title was decreed to be as set out in his report, and the property was ordered sold by the receiver and the proceeds divided. The property was thus sold and the receiver filed his report and was discharged. After introducing this record, the plaintiff offered in evidence a deed made by the receiver to the plaintiff, in pursuance of this sale. The defendant objected to the admission of this deed, upon various grounds, which were overruled by the auditor and the deed admitted in evidence as part of the plaintiff's chain of title. This ruling of the auditor was alleged to be erroneous in one of the defendant's exceptions of law. One of the objections to the admissibility of the deed was, that the description therein was vague, indefinite, and uncertain. We have been unable to find a copy of this deed in the record, and so do not know what the description was. We will say, however, that if, as we suppose, the property conveyed was described as the exposed granite on this particular land lot, the description would seem to be sufficiently definite and certain. Another objection was, that a receiver can not sell land held adversely, but must first obtain possession; and still another was because Wesley bid off the land at the receiver's sale and transferred his bid to the Collinsville Granite Company, the plaintiff in the present case, and that he, being the administrator of Grant, had no authority to bid at a sale of his intestate's property. The auditor was right in holding that the question of the right of Wesley to bid at a judicial sale of property wherein his intestate's estate owned an interest could be raised only by heirs at law or creditors of such intestate; and that the deed was not void and could not be collaterally attacked on this ground by the defendant. At the time that this deed was offered in evidence it did not appear that the receiver was not in possession of the property at the time that he sold it; presumably he was. It may have appeared, from evidence subsequently introduced by the defendant, that the receiver was not in possession of all of the property; but even if this had appeared when the deed was offered, it would not have been sufficient to exclude it from evidence. For as all the parties to the consent decree under which the receiver was directed to sell the property were bound

by the sale, whether the receiver had possession of the whole of the property or not, the purchaser at such sale acquired whatever interest, if any, they respectively had in the property, and the receiver's deed was admissible for the purpose of showing this. For the reason just given, there was no merit in the objection that this deed was not admissible because the defendant in the present case was not a party to the litigation which resulted in the consent decree under which the property was sold by the receiver. The defendant, of course, was not bound by such sale, and the deed was not offered in evidence for the purpose of showing that he was, but merely for the purpose of showing that the plaintiff had acquired whatever title the parties to this consent decree had.

20-22. The rulings announced in the 20th, 21st, and 22d headnotes need no discussion.

23. The plaintiff offered in evidence an affidavit made by W. H. Braswell Sr., under whom the defendant claimed, on August 4, 1888, wherein he deposed that he was the owner of "part of land lot No. 184 in the 16th district of DeKalb county, except the rock or granite;" that ninety acres of the same he purchased from Simeon Wheeler; "that it was sold to Wheeler as part of the estate of John Boyd, deceased, by D. T. White, administrator, and the remainder, about 32 acres, the widow's dower, deponent bought himself also as part of John Boyd's estate at administrator's sale. All of which he has owned and been in possession of for more than 25 years without let or hindrance from any person or persons, and during that time no one has exercised or appeared to exercise any possession of the rock or granite on the lot of land until the time of Mr. Collins within the last few years." The defendant objected to this affidavit, on the grounds, that Braswell was dead, and "that the affidavit was used in another litigation, to wit, the lawsuit in DeKalb county filed in 1888; which objection the auditor overruled, and admitted said affidavit in evidence." It is apparent that there was no merit in the exception to this ruling of the auditor. The affidavit was evidently offered for the purpose of showing that while Braswell was in possession of the land in question he admitted that he did not own the granite interest therein and had never exercised any possession over the same. Clearly the affidavit was admissible for this purpose, whether the affiant was

dead or not, and whether the defendant was or was not a party to the litigation in which the affidavit was used.

24, 25. A rather singular exception of the defendant was, that the auditor erred, as matter of law, in the following findings and rulings, to wit: "In addition to the evidence as set out in the brief, the auditor, at the request of both parties, visited the property and walked over and inspected the same. This personal inspection had considerable influence on the mind of the auditor in arriving at the conclusion and recommendation he hereinafter makes. He represents to the court that, in his opinion, much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted." We do not see how a party can object to the impression made on the mind of an auditor by a personal inspection of the property in dispute, when such party requested the auditor to make such inspection. The statement of the auditor, after this inspection, in his report, that, "in his opinion, much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted," certainly was not a finding by the auditor for or against either party. It was no finding at all, but a mere statement of a reason for findings which he did make. If any of his findings were wrong because contrary to the evidence submitted, they could have been excepted to on this ground. If he erred in excluding or admitting evidence offered, the way to test the correctness of such ruling was by proper exception thereto. We do not see how any practical result would have been accomplished even if the court had seriously entertained and sustained this novel exception, as the setting aside of this statement of the auditor would not have changed a single real finding that he made.

26. The auditor's finding as to the particular portion of Pine Mountain which was recoverable by the plaintiff, as exposed granite, was excepted to by the defendant, as being without evidence to support it. There was considerable evidence upon the subject, and the finding can not be said to be without evidence to support it. The sufficiency of the evidence to support this finding was a question for the court below, in passing upon the

exception, and the judge did not abuse his discretion in overruling this ground of the exception. Another ground of this exception was that one of the boundary lines as designated in the finding of the auditor was indefinite, uncertain, and impossible to locate, but which boundary line was thus referred to was not indicated, and this was a sufficient reason for not sustaining the exception on this ground. The exception should have clearly pointed out the boundary line which needed revision.

27. Two of the exceptions of the plaintiff, the Collinsville Granite Company, were framed upon the theory that the deed from Boyd's administrator to Wheeler and the deed from the latter to Braswell conveyed only the arable and cultivatable land, and therefore that the auditor erred in not finding certain designated portions of the land which the evidence showed, and the auditor found, were not suitable for cultivation, but upon which the granite was not exposed, to be the property of the plaintiff. This was an erroneous theory. The suit was only for the recovery of the "exposed granite," and, as we have seen, these deeds conveyed everything except the granite, and whether any particular portion of the surface soil, such as that upon a steep mountain side, was arable and cultivatable or not, these deeds embraced and conveyed it, and the owner of the granite would have no right, without the consent of the surface owner, to remove the soil and the vegetation growing therein, for the purpose of getting at and quarrying the granite, but would have to wait until such time as the underlying granite should become exposed. In one of these exceptions a finding of the auditor in reference to the portion of Pine Mountain recoverable by the plaintiff is alleged to have been erroneous, because the auditor had previously found that under the deed from Wheeler to Braswell it was the arable and cultivatable land which passed to the grantee, and the evidence showed that no part of this mountain was arable and cultivatable. If the auditor had expressly found that this deed conveyed only land which was suitable for cultivation, his finding, for reasons which we have already stated, would have been erroneous; but we think it is clear from his report that he did not intend to so find. He construed the deed from Boyd's administrator to Wheeler and the deed from Wheeler to Braswell as follows: "In construing these deeds, as matter of law, the auditor holds that all the arable

and cultivatable land passed to the grantees therein mentioned; but that the exposed granite on this lot of land was reserved to the grantors, their heirs and assigns; he holds that this reservation is good, and that the same is not inconsistent with the terms of the grant in each deed. But in so holding he expressly rules that the true intention and meaning of the parties was to reserve only such granite as was exposed at that time." Clearly, construing this finding in its entirety, it confined the exception in each deed to the granite which was exposed at the time the deed was executed and used the terms "arable and cultivatable" as descriptive of land where the granite was not then exposed. So this finding of the auditor was not inconsistent with his subsequent finding that the portion of Pine Mountain which he found was "still covered with earth and soil on which trees are now growing" was not recoverable by the plaintiff.

28. Error is assigned, in the bill of exceptions of the plaintiff, upon the decree of the court, upon the ground that the amount of the recovery in favor of the plaintiff for mesne profits embraced therein is less than the evidence before the auditor authorized. It is obvious that there is no merit in such an assignment of error. The decree followed the finding of the auditor upon the facts disclosed by the evidence, the exception to which finding was disapproved by the court, and the decree can not be changed without first changing the finding upon which it was based. One might as well undertake to set aside or change a judgment rendered upon the verdict of a jury, upon the ground that it was contrary to the evidence, without first setting aside the verdict, as to undertake to set aside or alter a judgment or decree rendered upon an auditor's report, upon the ground that such judgment or decree is contrary to the evidence which was before the auditor.

29. The decree enjoined the plaintiff "from interfering with granite awarded the defendant," and this is excepted to and assigned as error, "for the reason that there was no evidence to show that plaintiff was threatening to" so interfere, or that the damage arising from such interference would be irreparable, or that the plaintiff was insolvent; and for the further reason that "the nature of the interference referred to was not described, and the terms thereof were too general." The decree provided, that the defendant "be and is hereby enjoined from quarrying stone

upon any of the property described in the auditor's report and awarded by said report and this finding to the plaintiff, and that the plaintiff be enjoined from interfering with granite awarded defendant." The court simply placed the parties upon equal terms; it enjoined each from trespassing upon the property of the other; and the plaintiff who invoked this relief against the defendant is in no position to complain that the court, when granting it, also granted like relief to the defendant.

The decision in this case has been necessarily limited to and controlled by the exceptions which were properly made to the report of the auditor.

Judgment reversed upon the bill of exceptions of the plaintiff, and affirmed upon that of the defendant. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., not presiding.

SIMPSON, by next friend, *v.* GEORGIA, SOUTHERN AND FLORIDA
RAILWAY COMPANY.

LUMPKIN, J. Under the evidence introduced by the plaintiff in this case, there was no error in granting a nonsuit. The case does not fall within *Ashworth v. Southern Railway Co.*, 116 Ga. 635.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 29, — Decided August 5, 1905.

Action for damages. Before Judge Hodges. City court of Macon. September 29, 1904.

John R. Cooper and Marion W. Harris, for plaintiff.

Hall & Wimberly, R. C. Jordan, and J. E. Hall, for defendant.

TIMMERMAN *v.* STANLEY.

1. If one agreed to teach another in certain lines of instruction until the pupil was proficient in them, and, after beginning the course and receiving payment in full, abandoned the contract and refused to teach the student longer, the latter would have the right to treat the action of the teacher as a rescission and bring suit for the amount which had been paid by him.
2. If one of two contracting parties claims that the other has committed a breach of the contract, he can not in the same action both treat the contract as rescinded and sue for the amount paid by him to the other party, and at the same time rely on the contract as existing.

123	850
125	191
126	282

123	850
129	511

3. The allegations of the declaration in this case make it a suit for the amount paid to the defendant by the plaintiff, treating the contract as rescinded. In addition the plaintiff sought to recover certain damages resulting from a breach of the contract, treating it as of force. The latter claim should have been stricken on demurrer as inconsistent with the former.
4. The demurrer was not general for misjoinder of causes of action, so as to put the defendant upon his election, but was for inconsistency in joining certain claims with another, which had first been made and which it was claimed determined the character of the action.
5. As a general rule, where one party asserts the right to rescind a contract for non-performance by the other of his covenant, the party seeking rescission must restore or tender back to the other party what has been received from him, so as to restore the parties to the condition in which they were before the contract was made. But this rule has no application to a case where one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded and brings suit to recover the amount which he has paid under the agreement.
6. Under the principles above announced, there was no error in striking from the declaration certain claims for expenses in attending school, expenses pending suit, and delay in being prepared for business; but the entire case should not have been dismissed.
7. It does not appear that there was any contract in writing; and a demurrer on the ground that a copy of it was not attached as an exhibit was not well founded.

Argued June 29, — Decided August 5, 1906.

Action for breach of contract. Before Judge Hodges. City court of Macon. December 14, 1904.

Timmerman brought suit against Stanley, alleging as follows: On July 29, 1903, the plaintiff bought of the defendant a scholarship in Stanley's business college, in the city of Macon, in the telegraphic department, which embraced a course in learning telegraphy in said college. On August 12, 1903, he bought of the defendant a scholarship in the shorthand department in said college, which embraced a course in learning stenography, typewriting, etc. "The said scholarships were delivered to petitioner under the contract that a full course might be taken by him until he was proficient in said lines selected, without a limit of time." Stanley is the proprietor of the college, and the scholarships were sold by him to the plaintiff for the sum of \$64. On August 2, 1904, the plaintiff was expelled by the defendant from the college for no fault or cause on his part. He had violated no rules of the college, nor had he been guilty of any conduct to authorize the expulsion. He had not completed the courses prescribed by the

scholarships, and at the time of his expulsion was still pursuing his studies at the college. "Petitioner shows that said Stanley refuses to pay back to your petitioner the \$64.00 paid for said scholarships, and to which your petitioner is entitled on account of said Stanley failing to carry out said agreement in said scholarships; and petitioner prays for a judgment against said Stanley for said sum." By the breach of the contract defendant has damaged plaintiff in the sum of \$500. Plaintiff has paid out \$300 for board and expenses in attending the school in order to qualify himself for business. By reason of the expulsion he can not now finish his courses so as to enter business, as other business colleges will not receive him after being expelled from this one. He is now at a monthly expense of \$15, and will be so up to the time of the hearing of this action. "He prays for a judgment for said sum against the said Stanley." By reason of the breach of the contract defendant has delayed plaintiff in finishing his course so as to enter business for the current year, to his injury in the sum of \$500. The defendant demurred to the declaration generally, and also specially. The demurrer to that part of the declaration which seeks to recover the price paid for the scholarships was based on the ground that such price was not the legal measure of damages to which the plaintiff was entitled, if entitled to anything under the declaration. The allegation as to the expenditure of \$300 for board and expenses was demurred to on the ground that such items were not elements of damage for an expulsion from the college, and "because, the plaintiff having elected to disaffirm and rescind said contract by suing for recovery of the price paid for said certificate, can not bring an action for a breach of said contract arising under said certificate;" because an action for said expenses was an action inconsistent with a suit for the recovery of the purchase-price of said scholarship and can not be joined in the same declaration. The allegation that the plaintiff could not enter any other business college was demurred to, because it did not constitute an element of damage, for the same reasons. The allegation as to the monthly expense of \$15 was demurred to for the same reasons, and also because expenses incurred by the plaintiff subsequently to the alleged breach of contract can not be an element of damage therein. The allegation of damage by reason of delay in plaintiff's finishing his course

was demurred to, because the alleged damages were too remote and consequential, and not capable of exact computation; because they are not the legal and natural results of the alleged act; and because they are inconsistent with the damages laid in the paragraph seeking to recover the purchase-price of the scholarships, and can not be joined in the same action. The declaration was also demurred to because no copy of the contract was set out as an exhibit. The demurrer was sustained, and the plaintiff accepted.

M. G. Bayne, for plaintiff. *Davis & Miller*, for defendant.

LUMPKIN, J. (After stating the facts.) 1-5. Assuming the allegations of the declaration to be true, as we must do in considering the demurrer, each of the contracts evidenced by the two scholarships was entire, and when the defendant repudiated them the plaintiff had the right to treat his action as a rescission and bring suit for the amount which had been paid by him. *Supreme Council v. Jordan*, 117 Ga. 808. Or he might sue for a breach of the contract. *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51. In the latter event that decision holds that in some cases the amount paid by the plaintiff may be considered in fixing the amount of the damages. In 8 Am. & Eng. Enc. L. (2d ed.) 632 it is said: "As has been said more than once, the fundamental principle of damages is compensation to the injured party. This rule in the present connection is simply the application of the principle stated to contracts—that is, the measure of damages in such cases is the value of the bargain to the complaining party, or a loss which the fulfilment of the contract would have prevented or the breach of it has entailed. Or, as it has been said, the general intent of the law which gives damages in actions for breach of contract is to put the injured party, so far as it can be done by money, in the same position as if the contract had been performed. According to this principle the measure of damages for breach of a contract is not, as a general rule, the consideration paid, but rather the value of the thing contracted for; unless, indeed, the plaintiff has, under the circumstances, a right to disaffirm the contract, and sue to recover the consideration paid." The plaintiff can not in the same action both treat the contract as rescinded and rely on it. *Harden v. Lang*, 110 Ga. 392.

It is not quite easy to determine whether this action is one for breach of the contract, or one for the recovery of the purchase-price of the scholarships, based on the idea of a rescission, coupled with an effort to sue for the breach of the contract in the same action. It has been held that suit to recover the purchase-price is equivalent to an express disaffirmance, and that after such a disaffirmance there can not be a proceeding to enforce the contract, either by an equitable proceeding to compel specific performance, or by an action for damages. 24 Am. & Eng. Enc. L. (2d ed.) 645, and note 5. The plaintiff alleged that the defendant refused to pay back to him the \$64 paid for the scholarships, to which the plaintiff is entitled; and he prays for a judgment of that specific sum, not as damages, or as a part of his damages, or as throwing light on the amount of damages, but as a return of the purchase-money. Taking the pleadings most strongly against the pleader, the statement that the defendant refuses to pay back the amount to him implied that a demand had been made. We are of the opinion, therefore, that this part of the declaration treats the contract as at an end, and seeks to recover the amount paid by the plaintiff to the defendant under it. Such being the case, the particular portion of the declaration which sues for the recovery of such amount is not subject to demurrer on the ground urged against it. It is contended in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid, because in order to rescind the contract the plaintiff must restore the status, and must tender back to the defendant what he has received from him, and that this can not be done in the present case. Civil Code, § 3712. This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, or to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He can not hold on to the amount paid, refuse to proceed with the contract, and defend against an action to recover

the price paid, on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the status quo. He can not by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded. The code section cited has no application in such a case. *Henderson Warehouse Co. v. Brand*, 105 Ga. 217, 224. The cases of *Ala. Gold Life Ins. Co. v. Garmany*, and *Supreme Council v. Jordan*, supra, are also in point as to this contention.

It was argued that there was a misjoinder of causes of action; but the demurrer does not make this objection to the entire declaration. It attacks the effort to recover the money paid by the plaintiff to the defendant, on the ground already considered. It then attacks other parts of the declaration, on the ground that, the action being one based on a rescission of the contract, the items of damage claimed could not be properly joined with the suit for the money paid. This contention, if sustained, would result in striking those particular items, but not in dismissing the entire action for a misjoinder of causes of action. It is not the same thing to say that a declaration contains two inconsistent causes of action, and to put the plaintiff on his election to dismiss one of them or have the entire suit dismissed, and to say that the action is of a particular character, and that certain other claims can not be added to it.

6. From what has been said it is evident that the claim for expenses in attending school, expenses pending the suit, and delay in being prepared for business can not be joined with the action for the return of the purchase-price, based upon a rescission of the contract. Moreover, the allegations of the declaration with respect to those items are quite vague and general, and a part of the damages would not be recoverable even in an action based on a breach of the contract. The dismissal of the entire case was erroneous. The claim to recover the items of damage just referred to should have been stricken, and the case left to stand on the suit for the return of the price paid for the scholarships.

7. It does not affirmatively appear that there was a written

contract, and the ground of the demurrer that no copy of it was attached as an exhibit is not well founded.

Judgment reversed, with directions. All the Justices concur, except Simmons, C. J., absent.

CLARK *et al.* v. CLINE *et al.*

1. Where a county contains a town or city having a school system sustained by local taxation for a period of five months or more, to which direct apportionments are authorized to be made, the part of the entire county fund to be so paid is determined by the proportion which the school population of the town or city bears to the school population of the county as shown by the last school census. The statute declares that the division is to be made according to school population, not according to the number actually attending the schools.
2. The school population includes all children between the ages of six and eighteen years.
3. Children of school age resident in the county attending the public schools of such town or city are to be counted in the school population of such town or city, and are entitled to have their share of such county fund paid over to the proper officer of the municipal school board.
4. The local system of the City of West Point (created by the act of 1877) falls within this rule.
5. The question raised as to the constitutionality of the act of 1904, providing for the payment of the whole school fund of the county to the county commissioner of Troup county and a payment by him to the local school system of West Point of its share, was not decided by the presiding judge, and will not be determined by this court.
6. If the county school fund of Troup county, in which West Point is located, has been customarily paid to the county school commissioner, and a division made and the share of the city system of schools paid by him to it, and if the amount so paid is larger than the city system is entitled to under the law, and the county board of education and county school commissioner intend to continue such payment, citizens and taxpayers of the county outside of the city, who are also patrons of a school outside the city, have such an interest as will authorize them to proceed by application for injunction to prevent such payments.
7. The county board of education constitutes a tribunal for hearing and determining any matters of local controversy in reference to the construction or administration of the school law. But this does not oust a court of equity of its power to enjoin the board of education and school commissioner from making unlawful payments of part of the county school fund to a municipal school system operating independently of the county system.

Submitted July 1, — Decided August 5, 1905.

Injunction. Before Judge Freeman. Troup superior court.
May 18, 1905.

Cline and others filed their equitable petition alleging that the county school commissioner of Troup county had received the county school fund; that it was in the hands or under the control of the county board of education; and that the commissioner and the board of education were about to pay over to the officials of an independent local system in the City of West Point an amount in excess of that which was allowed by law, and would do so unless enjoined. By an amendment the board of education of West Point was made a party. It was alleged that the amount to be paid the local school system should be determined according to the school population, and not according to school attendance; but that the payment which it was proposed to make would be according to attendance. The defendants answered, and contended that the payment which would be made would be according to law, and that the contention of the plaintiffs would work an unjust and unequal mode of distribution. They also demurred to the petition. On the hearing the presiding judge granted the injunction, and the defendants excepted.

Longley & Longley and Hatton Lovejoy, for plaintiffs in error.
H. A. Hall and D. J. Gaffney, contra.

LUMPKIN, J. (After stating the facts.) 1-5. On February 7, 1877 (Acts 1877, p. 192), an act of the legislature was passed, the caption of which was, "An act to authorize the City of West Point, in Troup county, to organize a public school system independent of the public school system of the State of Georgia, and for other purposes." The first section provides, "That the City of West Point, in the county of Troup, be, and is hereby, authorized to organize a public school system independent of the public school system of this State; that said organization shall draw its pro rata share of all educational funds raised by this State, and that the chief executive officer of such organization shall make the same regular reports to the State school commissioner as are required from the county school commissioner of the public school system of this State." Under this act an independent public school system was created for the City of West Point; its chief executive officer was required to make reports to the State school commissioner, similar to those required from county school commissioners; and this independent organization was to draw its pro rata share of all educational funds raised

by the State. The act itself did not declare how the pro rata share was to be ascertained; but that was left for determination according to the general law. The legislature had power to declare how the pro rata share of independent school systems should be determined, and on what basis calculated, and the West Point system under this act was entitled to its pro rata share calculated on the basis which the legislature might fix at any time.

In 1887 an act was passed revising, amending, and consolidating the school laws of the State. Acts 1887, p. 68. In 1894 an act was passed to systematize the finances and increase the efficiency of the common schools. Acts 1894, p. 60. The laws relating to the public school system will be found codified in the Political Code of 1895, §§ 1338-1408. Several amendments to the school laws have been made since that code, but none of them are material to this controversy, and none are relied on by counsel, except a local act passed in 1904, which will be referred to hereafter. Section 1406 of the Political Code, which was codified from the act of 1894, reads as follows: "In those counties having local laws, where schools are sustained by local taxation for a period of five months or more, the State school commissioner shall, on the first day of January, April, July, and October of each year, or as soon thereafter as practicable, notify the Governor of the amount of funds standing to the credit of each of such counties on the books of the treasurer on said dates, arising from the quarterly apportionments aforesaid, and thereupon the Governor shall issue his warrant for said sums, and the treasurer shall draw his checks for said sums without requiring the itemized statements as provided; and the State school commissioner shall immediately transmit said checks to the officer under the local system authorized to receive its funds, and the State school commissioner shall, in like manner, pay over to the proper officer under the school board of any town or city having a school system sustained by local taxation for a period of five months or more, and to which he is now authorized by law to make direct apportionments, such proportion of the entire county fund as shown on the books of the treasurer as the school population of the town or city bears to the population of the county, as shown by the last school census: *provided*, that all children of school age resident in said county, and attending the public schools of

such town or city, shall be counted in the school population of such town or city and be entitled to have their share of such county fund paid over to the proper officer of the school board of such town or city." This distinctly declares that the State school commissioner shall pay over to the proper officer under the school board, in a town or city having a separate school system, "such proportion of the entire county fund as shown on the books of the treasurer as the school population of the town or city bears to the population of the county." (Omitting the proviso as to children resident in the county and attending the public schools in the town or city.) This language is plain and clear. It declares how the proportion or pro rata part of the entire county fund which shall be paid to the proper officer of the local school board is to be determined. The rule laid down for making the calculation is this: As the school population of the town or city is to the school population of the county, so is the proportion or share of the county fund which shall be paid to the officer of the local board to the entire county fund. Thus, if the entire school population of the county were five thousand, and the school population of the town or city were one thousand, the local system would be entitled to one fifth of the entire county fund. In estimating the school population of the town or city the proviso at the end of this section declares that all children of school age resident in the county, and attending the public schools of such town or city, shall be counted in the school population of such town or city, and be entitled to have their share of the school fund paid over to the proper officer of such town or city. In the illustration given the one thousand, therefore, is to be considered as including the school population as thus calculated in accordance with the terms of the act.

It is contended that the act of 1894 and the section of the code derived from it do not apply to the school system of West Point, because the act authorizes the State school commissioner to pay over to the proper officer "under the school board of any town or city having a school system sustained by local taxation for a period of five months or more, and to which he is now authorized by law to make direct apportionments." It is not denied that West Point is a city having a school system sustained by taxation for a period of five months or more; but it is contended that the

act by its terms is applicable only where the State school commissioner "is now authorized by law to make direct apportionments;" and that the West Point school system does not fall within this description. As has already been noted, under the act of 1877 the City of West Point was authorized to organize an independent public school system, having a chief executive officer who was required to make to the State school commissioner reports similar to those required by county school commissioners, and "said organization shall draw its pro rata share of all educational funds raised by this State." In the second section of the act, after providing for the election of a board of commissioners for the school system, it is expressly declared that "Said board shall receive all monies drawn from the educational funds raised by this State, and all funds raised by taxation in said city," etc. There is nothing in the act which intimates that the county school commissioner of Troup county is to receive the pro rata share of the educational fund from the State, and pay it over to the local board. While it did not in terms declare that the State school commissioner should make a direct apportionment to the local board, yet it seems to us the very plain meaning of the act is to authorize him to do so. What reason was there for requiring the chief executive officer to make regular reports to the State school commissioner similar to those made by county school commissioners, and declaring that the board should receive all monies drawn from the educational funds raised by the State, if the legislature meant that the county school commissioner should receive these funds and pay them over to the board? This act nowhere even mentions the county school commissioner, but places the local board in direct communication with the State school commissioner. It is said in the brief of counsel that it has been the practice under that act for the county school commissioner to receive the funds from the State school commissioner, and pay over to the local board its proportion. We do not know how this may be, but we entertain no doubt that under the act of 1877 the State school commissioner was authorized to make a direct apportionment to the local board, and that it therefore came within the terms of the act of 1894. Even if this were not clear, there has been a practical adjudication on this point, in the case of *Bridges v. State*, 103 Ga. 21, 35. In the opinion Chief Justice

Simmons said: "By an act approved August 11, 1881 (Acts 1881, p. 421), a public school system was established for the City of Rome, independent of the county school system. Under its provisions, that portion of the school fund which belonged to the City of Rome was paid by the State authorities to the county school commissioner, who was in turn required and authorized to pay it to the city authorities. The general act approved October 27, 1887 (Acts 1887, p. 68), contains no provisions which would authorize the payment by the State authorities directly to the City of Rome of her proportion of the school fund, but the act approved December 13, 1894, codified as section 1402 et seq. of the Political Code, does provide expressly for such payment. As to this matter, the terms of the act (Pol. Code, § 1406) apply to the schools of the County of Floyd and the City of Rome, and the school funds belonging to the latter pass directly into the hands of the proper city authorities." Indeed, it was held in that case that the county school commissioner was not authorized in his official capacity to receive or disburse that portion of the school fund.

It is contended that if the State school commissioner was authorized at any time to pay the pro rata share of the West Point school system directly to the local board, this was changed by the act of August 13, 1904. Acts 1904, p. 332. This act amended the act of 1877 by adding at the end of the first section the following words: "Said officer shall file a copy of said reports with the county school commissioner of Troup county, and said public school system of West Point shall draw its pro rata share of the public school money apportioned each year to said county, and the county school commissioner shall pay the same over to the person authorized to receive it." Plaintiffs reply by saying that this act is unconstitutional as being a special law in a case provided for by the general laws above referred to. The presiding judge did not decide this constitutional question, and therefore we deem it unnecessary to do so. Whether that act is constitutional or not makes no difference as to the mode of calculating the pro rata share of the local school system of West Point. It merely affects the question whether such share shall be paid directly to the local board, or whether it shall be paid to the county school commissioner, and by him to the local board. If,

then, the rule is that the pro rata share of the local system is to be determined according to the ratio between the school population of the city and the school population of the county, the only remaining question, in ascertaining the exact amount, is to determine what constitutes the school population. This is answered by sections 1389, 1390, and 1391 of the Political Code, which provide for taking a census of the school population, and declare that there shall be an enumeration of the number of children between the ages of six and eighteen years. With these rules stated, there can be no difficulty in determining what is the pro rata share of the entire county school fund which shall be paid to the local board of West Point. It is urged that the fund going to the county outside of West Point—or at least in the school which is patronized by the complainants—is disbursed according to school attendance, and that it is unfair and inequitable to make this disbursement on such a basis, while in the City of West Point the attendance is much higher, so that the amount per scholar according to attendance in West Point is much less than the amount per scholar according to attendance outside of West Point. Whether the argument is based on sound considerations of equity or not is immaterial; and on that point we express no opinion. The statute determines the mode by which the pro rata share to be paid to the local school board shall be ascertained. If it is not a just rule, the legislature can change the law; the courts can not do so. The pro rata shares of the counties are determined on the same basis of school population. Pol. Code, § 1403. After the share of the local school system has been paid over to its board, the balance remains for use by the county authorities. The county board has power to employ teachers and make contracts with them. *Id.* § 1360. “It shall be the duty of said board to make arrangements for the instruction of the children of the white and colored races in separate schools.” *Id.* § 1363. “The county board of education shall have power, if they deem best, to employ teachers at a salary.” *Id.* § 1370. It will thus be seen that considerable discretion is conferred upon the county board of education in reference to the disbursement of the county fund and the payment of teachers. There is nothing in the law which requires them to pay the teachers according to the number of scholars attending. Indeed, if the public school system of

West Point has received all that it is entitled to, we do not perceive how it is concerned with the mode in which the county board of education shall disburse that part of the fund over which they have control. Whether the number of children attending the school is made the basis for paying the teacher, or whether the teacher is employed at a salary, or like matters, do not affect the local school system. There is no claim that the county board of education is making any unlawful use of the remaining fund.

On August 26, 1903, the Hon. John C. Hart, attorney-general, furnished to the State school commissioner an opinion in which he construed the law in regard to determining the pro rata share of local systems. See Opinions of Attorneys-general from January 1, 1891, to January 1, 1904, p. 387. In it he says: "The county is treated as a unit, and the local system should be treated as but another unit in a unit. . . . I therefore advise, irrespective of any directions to the contrary in the act creating the local systems, that you adopt the rule of apportionment ~~between~~ the local system and the county, using as a basis 'the proportion which the school population of the local system bears to the school population in the county.'" In this case it appears that there are local systems in Hogansville and LaGrange, and, in making his calculation as to the amount which shall be paid by the county school commissioner to the local system at West Point, the presiding judge excluded the school population in those two places. The acts creating those local systems are not before us, nor is any contention made in regard to them. We are led to infer that they receive their pro rata share directly and not through the county school commissioner, and therefore, that, inasmuch as the county school commissioner has been receiving the share of the West Point system along with that of the rest of the county, the calculation is made accordingly. No contention is made before this court that the exclusion of the school population of Hogansville and LaGrange in making the calculation is improper. The judge in granting the injunction also states that this judgment does not prohibit said county school commissioner from paying the West Point schools, in addition to such proportion, such sum as is provided by law for children outside of the city, attending the schools of West Point.

6. 7. It is urged, that, even if the method of division which is

attacked by this proceeding is illegal, nevertheless the plaintiffs are not entitled to injunction, both because they are not injured, and because the county school board constitutes a school court, and that it, and not the superior court, has jurisdiction of the subject-matter of this controversy. One who neither is nor will be hurt by an illegal proceeding has no right to enjoin it. Thus in *Mayor v. Simmons*, 96 Ga. 477, complaint was made by citizens and taxpayers of Gainesville that the county school commissioner of Hall county was making payments to be used in the support and maintenance of the public schools of that city, which were illegal. It was held that the complainants were not entitled to an injunction, because "no person can possibly be heard to complain in equity of that with which he is in no way concerned, and which not only can not injure him but may operate to his benefit." See also *Reid v. Eatonton*, 80 Ga. 755. The facts of this case, however, do not bring it within the decisions cited. The plaintiffs are citizens and taxpayers of the county outside of the City of West Point, and patrons of the rural schools. They therefore have a direct interest in having the school fund applicable to the county system properly preserved and lawfully applied, and to enjoin its misuse or disposition contrary to law. A taxpayer, though his contribution to the public fund may be small in proportion to the aggregate, nevertheless has such a pecuniary interest in the sum made up from taxes, of which his forms a part, as to authorize him to see that there is no illegal diversion of such sum. Such a fund is in the nature of a trust fund, which equity will preserve from misapplication. Accordingly it has been held that citizens and taxpayers of a town could enjoin the unlawful establishment of a dispensary by the corporate authorities, because it would or might require an improper expenditure of the public funds. *Mayor etc. of Leesburg v. Putnam*, 103 Ga. 110. In *Mayor etc. of Macon v. Hughes*, 110 Ga. 795, it was held proper to enjoin municipal authorities from holding an election to determine whether a given territory should be annexed to a city, when the ordinance calling the election was plainly ultra vires. This was done at the instance of residents and taxpayers. In *Mitchell v. Lasseter*, 114 Ga. 275, 281, it was said: "A court of equity will, at the instance of citizens and taxpayers of a county, enjoin the authorities in charge of the affairs of such

county from carrying into effect an unauthorized order or judgment providing for the location of a county-site, in the execution of which order it will be necessary either to expend the money of the taxpayers in the treasury of the county, or to incur illegal indebtedness by the county." In *Mayor of Americus v. Perry*, 114 Ga. 871, 884-5, it was held proper, at the instance of taxpayers and citizens of a municipal corporation, to enjoin the authorities from carrying into effect various ordinances which were ultra vires, providing for the election of certain public officers, for the reason that if such officers were elected they would have an apparent demand against the municipality for compensation, which would have to be resisted at the expense of the taxpayers, or illegally paid out of the funds of the corporation. See also 2 High on Injunctions (3d ed.), §§1236, 1241, 1243; *Rice v. Smith*, 9 Iowa, 570.

As to the contention that the board of education of Troup county is a school court, it may be said that for certain purposes and within certain limits this is true. But it is a court of limited jurisdiction. *Cheney v. Newton*, 67 Ga. 477. It is a tribunal for hearing and determining any matters of local controversy in reference to the construction and administration of the school law. Pol. Code, 1895, §1364. Thus the board has power as to the establishment and location of schools, the employment of teachers, and, until recently, in the selection of text-books; also in the preservation of order, enforcement of discipline, and the carrying out of the rules that may be established. Controversies occurring out of these and other similar matters are properly for the consideration of the county board of education. *Pierce v. Beck*, 61 Ga. 413. But they have no power to unlawfully give to a separate local school system money which does not properly belong to it, nor to misapply public funds arising from taxation. Whether their jurisdiction to determine matters of local controversy in reference to the construction or administration of the school law would confer upon them authority to pass upon the constitutionality of an act of the legislature, or to render a judgment on that subject which would be binding as an adjudication, may well be doubted. Certainly they have no authority to grant an injunction to prevent the unlawful payment of money from being made. In the opinion filed by the presiding judge it was

said: "It is admitted that by this system the sum of money paid over to the West Point schools, being based on attendance on said schools, is greater than these schools would receive if based on school population. . . It is admitted that more is paid to West Point schools than her proportion based on school population, and the board of education and county school commissioner propose to continue such payment." Under such circumstances, the remedy by injunction was proper. The remark made in the opinion in *Mayor of Gainesville v. Simmons*, supra, that "It is the business of the State school commissioner, and not of the taxpayers of Gainesville, to determine whether or not the school commissioner of Hall county makes illegal or unauthorized payments to the Gainesville school fund," was not an adjudication that taxpayers outside of Gainesville would not have had the right to invoke the aid of a court of equity to protect their interests. This statement is to be taken in connection with the fact above referred to, that the schools of Gainesville were already receiving more than they were entitled to; and the taxpayers of that municipality were not in a situation to set themselves up as regulators to enjoin a distribution of which they were receiving the benefit.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

TURNER v. WOODWARD.

- FISH, P. J. 1. Where, by threats of imprisonment or promises to hold him harmless, A induces a constable to deliver to him property which is in the possession of the officer by virtue of a levy, and the constable is subsequently ruled by the plaintiff in fl. fa. and compelled to pay to him the value of the property so relinquished, A is liable to the constable for the loss or damage sustained by the latter by reason of such delivery of the property.
2. In such a case it was not error for the court, in instructing the jury, to use the words "loss" and "damage" interchangeably.
3. The charge of the court was full and fair; and the evidence, while conflicting, was ample to sustain the verdict.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted July 1. — Decided August 5, 1905.

Action for damages. Before Judge Reagan. Henry superior court. January 5, 1905.

Marcus W. Beck and E. M. Smith, for plaintiff in error.
John S. Gleaton, contra.

CHATFIELD *v.* CLARK.

1. C filed an application to enjoin A and B from dispossessing him under a dispossessory warrant sued out by them jointly. A restraining order was granted, and before the hearing on the application for injunction B died, and C moved to postpone the case until parties could be made. *Held*, that the interlocutory hearing could properly proceed to determine the question whether A should be enjoined notwithstanding the death of B.
2. One in possession of real property, having no title thereto or interest therein, but occupying merely the relation of an agent or caretaker of the premises for the owner, can not in his own name institute an action to enjoin a proceeding sued out against such agent as a tenant of another.

Argued July 1,—Decided August 5, 1905.

Petition for injunction. Before Judge Reagan. Pike superior court. May 19, 1905.

Clark and his wife Ida claimed title to a house and lot in Barnesville, and sued out a dispossessory warrant to evict Maria Chatfield as a tenant holding over. Maria Chatfield filed a petition praying that the Clarks be enjoined from prosecuting the dispossessory warrant. Clark's wife died before the hearing, and when the injunction case was called the plaintiff moved for a continuance until the legal representative of Clark's wife could be made a party. This motion was denied. At the hearing it appeared that the Clarks had a deed to the property in controversy from Jeff Walker, who had died since making the deed; that before his death he had promised to give Maria Chatfield the rent of the house for services rendered to him; and that after his death his son and sole heir had asked her to take care of the place and live in the house until he returned home. The plaintiff attacked the deed to the Clarks, on the ground that Jeff Walker was not of sound mind when he made it. On this question the evidence was conflicting. It was also shown that Clark was insolvent, and that Maria Chatfield was unable from poverty to give bond in the dispossessory-warrant proceeding. The judge refused to grant an injunction, and Maria Chatfield excepted, assigning error also upon the refusal to grant a continuance.

W. W. Lambdin, for plaintiff.

A. A. Murphey and *J. M. Smith*, for defendant.

COBB, J. 1. "It is a principle of equity that the death of one defendant only abates the proceeding quoad him." *Howard v*

Bank, R. M. Charl. 216. If the suit is of such a character that it is possible to make a final decree against the surviving party, it is not necessary to revive the suit against the legal representative of the deceased party; but the rule is otherwise where the deceased defendant is a necessary party to the determination of the controversy. 5 Enc. P. & P. 840. As the dispossessory warrant was sued out jointly by the Clarks claiming to be joint owners of the property, and the present petition was an application to enjoin that proceeding, no final decree could properly be rendered in the present case until the legal representative of Ida Clark was made a party. But the death of Ida Clark and the abatement of the suit as to her would not be a sufficient reason to postpone a hearing of the application for an injunction, where the surviving husband was seeking to revoke a restraining order which had been granted as to him. The restraining order was granted against both the husband and the wife. It was still in force against the husband, notwithstanding the death of the wife; and while the case as to parties was not ripe for final decree, there was no good reason why the surviving defendant, who was still restrained by an order of the court, should not have the right to be heard on the question as to whether the restraining order should be continued in force as to him. Nothing done at this hearing would bind in any way the legal representative or heirs of Ida Clark, who were no parties to the proceeding, and the surviving husband had the right to ask that the restraining order as to him be dissolved, in order that he might assert whatever rights he had in the dispossessory-warrant proceeding. Whether the death of Ida Clark would abate the dispossessory warrant at the stage of the case at which the injunction was granted we need not now determine, but we have no doubt that the surviving husband had the right to insist on a hearing of the application to dissolve the restraining order, notwithstanding the death of his wife.

2. The plaintiff was only an agent of one claiming to be the owner. She had no interest in the property, either as tenant or otherwise. 18 A. & E. Enc. Law (2d ed.), 166. She was a mere caretaker. Her possession was the possession of her principal, and upon his possession she could defend against the dispossessory warrant; and if the ownership of the principal and her possession in his behalf were established, the dispossessory

proceeding of the Clarks would fail. Of course if she entered under the Clarks, or, after entering, the relation of landlord and tenant arose between them, she could not dispute their title and defeat the dispossessory warrant by showing title in another. But if she was a mere agent or caretaker having no beneficial interest in the property, she certainly has no standing in a court of equity as a plaintiff in her own name seeking to enjoin a proceeding brought by others who claim to own the property. See, in this connection, *Cunningham v. Elliott*, 92 Ga. 159; 2 High on Inj. (3d ed.) § 1547. Her rights were purely defensive. She could not become the actor, such a position being one which the law authorizes only her principal to assume. Had it appeared that the plaintiff had title to the property, or claimed possession in her own right, a different question would have been presented. See, in this connection, *Gilmore v. Wells*, 78 Ga. 197; *Brooks v. Stroud*, 111 Ga. 875; *Brown v. Watson*, 115 Ga. 592; *Johnson v. Thrower*, 117 Ga. 1009. It appearing from the uncontradicted evidence that the plaintiff was at most a mere agent or caretaker for another, and had no interest in the property, it was not error to deny the injunction.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

PARKS, trustee, v. BALDWIN *et al.*

FISH, P. J. The judge of the superior court did not err in refusing, on the petition of the trustee in bankruptcy of the mortgagor for such relief, to enjoin the sheriff from proceeding to sell the mortgaged property in his possession by virtue of a levy under the mortgage *fi. fa.*, and in not ordering him to deliver such property to the trustee, the mortgage having been executed more than four months prior to the petition in bankruptcy, there being no question raised as to the validity of the mortgage or the debt it was given to secure, the debt not having been proved in bankruptcy, and the trustee not offering to pay the same. See *Reed v. Equitable Trust Co.*, 115 Ga. 780, and *cit*; *Merry v. Jones*, 119 Ga. 643; *Heath v. Scheffer*, 2 Am. B. R. 98; *In re Gerdes*, 4 Id. 346; *Carling v. Seymore Lumber Co.*, 8 Id. 29; *Eyster v. Gaff*, 91 U. S. 521; *Railroad Company v. Gomila*, 182 U. S. 478.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Argued July 11, — Decided August 5, 1905.

Petition for injunction. Before Judge Sheffield. Terrell
superior court. January 18, 1905.

*Slaton & Phillips, W. H. Gurr, and J. G. Parks, for plaintiff.
R. R. Marlin, H. A. Wilkinson, and Smith, Hammond &
Smith, for defendants.*

ARRINGTON *v.* CRONIN.

Under the facts appearing in the record, the court erred in dismissing the motion for new trial.

Submitted June 21, — Decided August 5, 1905.

Motion for new trial. Before Judge Parker. Ware superior court. November 17, 1904.

J. L. Sweat, for plaintiff in error.

Toomer & Reynolds, contra.

FISH, P. J. At the April term, 1904, of Ware superior court, Mrs. H. T. Arrington filed a motion for a new trial in a case in which J. Cronin had obtained a verdict against her during that term. At the time the motion was filed, an order was granted that it be heard in vacation, on May 21, 1904. This order provided, "that movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation; and if the hearing of the motion shall be in vacation and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined." Movant filed a brief of evidence and charge of the court in the clerk's office on April 29, 1904. On May 20, 1904, a consent order was passed continuing the hearing of the motion until June 27, 1904. This order recited that "It is further ordered that movant have until said time to have the brief of evidence and charge of the court in said case approved and filed, and also to amend and otherwise perfect the said motion for new trial." On June 27, 1904, the following order was passed: "Plaintiff [respondent] not being ready, it is ordered by the court that the hearing of above-stated motion be continued until the 21st day of July, 1904, to be then heard at Baxley, Ga. It is further ordered that defendant's [mov-

ant's] right to have the brief of evidence and charge of the court and to amend said motion be preserved until the hearing." The motion not being heard and no action taken thereon before October 1, 1904, the judge, upon the application of respondent's attorney, and in pursuance of the original term order, fixed the hearing of the motion for October 10, 1904, and provided that notice be served upon movant. The motion was not heard on the last-mentioned date, nor any order granted in reference thereto. During the November term of the court the motion was called in its order for hearing, and was, on motion of respondent "dismissed because no brief of evidence [had] been approved in terms of the consent order of May 20, 1904." To the order dismissing the motion the movant excepted.

We think the exception well taken. Granting that the consent order of May 20 was a limitation upon the original term order, and that under its terms the movant was required to have the brief of evidence approved on or before June 27, we think it clear that the order passed on the date last mentioned preserved movant's right to have the brief of evidence approved until the final hearing. The order of June 27 clearly contemplated that some right of the movant in reference to the brief of evidence should be preserved until the hearing of the motion; for it provided "that defendant's right to have the brief of evidence . . . be preserved until the hearing." Evidently by inadvertence there was a word, or words, left out of the order here. The use of the word "preserved" clearly and unmistakably indicated that the right of the movant in reference to the brief of evidence which this order contemplated was a right which had been secured to her by previous orders of the court. This right, whatever it was, was to be "preserved," that is kept intact or protected. The last previous order of the court had provided that the movant should have until June 27, 1904, the date which it fixed for the hearing, "to have the brief of evidence . . . in said case approved and filed," and this was clearly the right of the movant in reference to the brief of evidence which was, under the order of June 27, 1904, to be "preserved" until the final hearing. A brief of evidence had been filed on April 29, 1904, and it needed nothing but the approval of the court. No question was made on the correctness of the brief of evidence, nor did the court refuse to ap-

prove it, but the motion for a new trial was dismissed upon the ground that the brief of evidence had not been approved conformably to the consent order of May 20, when that order had been superseded by the order of June 27. We think his honor erred in the ruling excepted to; and the judgment is therefore *Reversed. All the Justices concur, except Simmons, C. J., absent.*

MALLARD v. CURRAN *et al.*

123 872.
c126 278:

1. A borrower of money executed a deed of trust to secure the payment of the debt, and subsequently died before the debt was paid. The holder of the loan deed consented for the administrator to sell the fee-simple title to the land at public outcry, and this consent was made public by the auctioneer at the time the land was exposed for sale. The administrator had previously been granted leave by the ordinary to sell the land. The property was put up and after considerable bidding was knocked off to the plaintiff at a sum stated. Afterwards, though the purchase-price was tendered by the plaintiff, the tender being a continuous one, the administrator refused to make a deed to the land, but prepared to have it resold. *Held*, that the purchaser at the administrator's sale could maintain an action to require the administrator to make her a deed, and to compel the holder of the loan deed to cancel his evidence of indebtedness.
2. Under the allegations of the petition, the expenses of the litigation were not recoverable.

Argued June 21,—Decided August 5, 1905.

Equitable petition. Before Judge Lumpkin. Fulton superior court. August 2, 1904.

The case made by the petition is substantially as follows: Mrs. Annie Curran died intestate, the owner of described realty in the city of Atlanta. She had previously executed to named persons, as trustees of the Penn Mutual Life Insurance Company, a non-resident corporation having an office and agent in Atlanta, a trust deed to the property to secure a loan of \$3,700. Upon the death of Mrs. Curran, Michael Curran was appointed her administrator; and at the September term, 1903, of the court of ordinary of Fulton county he was granted leave to sell the property heretofore mentioned, and thereupon proceeded to advertise it for sale on the first Tuesday in October, 1903. The administrator, through his agent, arranged with agents of the Penn Mutual Life Insurance Company "to sell said property free from said loan, and said corporation, through its said agents, agreed that it would

accept payment of the debt, with interest to the date of payment in full of the amount of said loan, said money to be paid out of the proceeds of said sale, to which agreement said Michael Curran assented, and in the advertisement which he published of said administrator's sale he advertised for sale as administrator the fee-simple interest in said property." On the day fixed for the sale, within the legal hours, and at the court-house door, the property was exposed for sale by the administrator through his auctioneer. The auctioneer, who was the agent of the administrator, made public announcement at the time the property was exposed for sale, in clear and unequivocal terms and in the presence and hearing of the administrator, "that the property would be sold free from the lien of the debt due the corporation above referred to, and that the purchaser would get a fee-simple title from said administrator, the loan deed above referred to to be paid by the administrator out of the proceeds of said sale, and the purchaser to get for the amount of his bid a title free of the claim of said loan deed." The auctioneer then invited bids, and the property was finally knocked off to the plaintiff, for \$4,200, the highest bid. Shortly thereafter the administrator, without warrant or authority, stated that he would not comply with the terms of the sale, and that he would not make the plaintiff a deed to the property. Nevertheless the plaintiff made a tender of \$4,200, the amount of the bid, to the administrator, which was a continuing one, and which he has refused to accept; and she tendered the money into court. The administrator is again advertising the property for sale, and will sell it unless restrained by the court. The reasonable rental value of the property is \$50 per month. The administrator is in possession of the property and refuses to deliver possession to the plaintiff. If he is allowed to sell the property as he is attempting to do, no title will pass to the purchaser, but a cloud will be created on the plaintiff's title, which she alleges vested in her upon the acceptance of her bid by the auctioneer. Curran, individually and as administrator, has acted in bad faith, and has put the plaintiff to unnecessary trouble and expense; and she is entitled to a judgment against him for \$750 on that account. The prayers of the petition were: that the administrator, the trustee for the insurance company, and the company itself be made parties defendant, and that process issue

directed to each; that the administrator be enjoined from interfering with the title to the property, and from making or attempting to make any further sale thereof; that the administrator be required to make title to the property to the plaintiff, in compliance with the terms of the sale; that the administrator be required to pay to the insurance company, out of the fund tendered in court, the amount of the principal, interest, and charges due on its loan, and that the insurance company be then required to execute a quitclaim conveyance of the property, or legal cancellation of its loan papers; for judgment against Curran, as administrator and individually, for \$750 costs and damages as set out in the petition.

To this petition Curran, the administrator, demurred generally, and on the grounds: that the petition does not set out the terms of the sale as to the time of paying the purchase-price, nor does it allege the time when the tender was made; that it does not show that the plaintiff insisted on her bid or made known to the administrator any objection to withdrawing the property from sale and advertising it for sale on another and later day; that the petition is bad for misjoinder of parties defendant, in that it prays for a judgment against Curran for damages individually in an action against him as administrator, and in that it joins three other defendants, who are strangers to the administration, to give effect to an alleged administrator's sale of land; that the petition is multifarious; and that damages are not recoverable under the facts alleged, the particular items of damage are not shown, and there is a misjoinder of a claim for damages against Curran individually and as administrator. The court, after argument, ordered that the demurrer be sustained and the petition dismissed, and the plaintiff excepted.

John L. Hopkins & Sons, for plaintiff.

Henry Walker and DuBignon & Alston, for defendants.

CANDLER, J. (After stating the foregoing facts.) While no express ruling was made by the trial judge on the separate grounds of demurrer, it follows from the fact that the petition was dismissed at the plaintiff's cost that the general demurrer was sustained, and we turn our attention first to the question whether the petition set out a cause of action.

1. There can be no doubt that where there is in the vendor

power to make a sale of real estate at auction, a contract of purchase and sale is completed upon the fall of the auctioneer's hammer and the acceptance of the bid. Either party to the contract may then enforce performance by the other, or sue for damages on account of non-performance. 3 Am. & Eng. Enc. L. (2d ed.) 501; *Tillman v. Dunman*, 114 Ga. 409. Of course the court will not require an administrator to do an unlawful or unauthorized act; so the issue narrows down to the single question whether or not the administrator had power and authority, under the allegations of the petition, to advertise and sell at public outcry the fee-simple title in the property of his decedent. It goes without saying that a man can not sell that which he does not own; and as the administrator in the present case did not own the fee to the property but had only an equity of redemption therein, it might seem at first blush that he was without authority to convey anything more than that equity. It is to be borne in mind, however, that the insurance company, by its trustees, together with the administrator, did own the entire interest; and we know of no legal reason why the united action of all the parties concerned might not operate to convey the fee-simple title. The insurance company is not a party to this demurrer, and has not been heard so far to object to the consummation of the sale upon which the plaintiff insists. According to the petition, full power was given by it to the administrator to sell its entire interest in the land. Certainly, there can be no objection to its taking this method of obtaining payment of its debt in preference to the institution of foreclosure proceedings. This agreement by it was not kept secret from the public, thus injuring the chances of bidding by those who did not desire to purchase property with an incumbrance; but it was made known, by public announcement at the time of the auction, that the purchaser would get a fee-simple title clear of all incumbrances. This, then, was tantamount to authority granted by it to the administrator to sell its interest in the property along with his own. A case closely in point is that of *Thompson v. Atwater*, 84 Ga. 270, where it was held: "Where a vendor sells land, and the vendee pays a part of the purchase-money and then dies, the only interest which his administrator can sell is that which the vendee had in the land as represented by the amount of purchase-money he paid. Nor can

the administrator and vendor, when the land is exposed for public sale, privately agree that it shall be sold and the proceeds applied first to the payment of balance of purchase-money, and that the interest of the vendor shall be sold provided he receives that balance. The vendor may consent for the whole interest in the land to be sold, but notice of this consent must be publicly given at the sale, that the property may bring its full value." It will be seen that the allegations of the petition in the present case measure fully up to the rule laid down in the last sentence quoted above. There is no suggestion in the record that the property did not bring its full value on the sale, or that the estate was thereby injured. We are forced to the conclusion that the court erred in dismissing the petition on general demurrer.

2. We are clear, however, that the allegations of damages, and the prayer for the recovery of \$750, should be stricken. Aside from the fact that the administrator could not be held liable in both his individual and his representative capacity, and the further fact that the estate should not be mulcted in damages for the alleged misdeeds of the administrator, there were no such allegations of bad faith, stubborn litigiousness, and wanton disregard of the rights of the plaintiff as would support a recovery for the expenses of the litigation. See, on this subject, *Pferdmenges v. Butler*, 117 Ga. 400. The other grounds of the special demurrer, however, are without merit. The allegations of tender and the other circumstances of the transaction were sufficiently explicit. The petition was not bad for misjoinder, nor was it multifarious.

Judgment reversed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

CARTER v. SOUTHERN BANKING AND TRUST CO.

There was at least some evidence to authorize the verdict, and no sufficient reason has been shown for reversing the judgment.

Argued June 22, — Decided August 5, 1905.

Appeal. Before Judge Lumpkin. Fulton superior court. September 24, 1904.

Joseph W. & John D. Humphries, for plaintiff in error.

Walter T. Colquitt, contra.

COBB, J. Mrs. Carter was the owner of a lot of land upon which there was an incumbrance represented by a loan deed. The debt was evidenced by a note for the principal and coupon notes for interest each six months during the time the loan was to run. Having made an advantageous sale of the property, she desired to secure the cancellation of the loan deed. The deed was cancelled and a sum paid the holder which represented the principal of the debt and the interest that had accrued to the date of the cancellation. It is claimed that there was a mistake in the settlement, that the real transaction between the parties provided for the payment of the amount above referred to and six months unearned interest as a consideration for the cancellation before maturity of the principal note, and the present suit is brought for this unearned interest. The defendant contends that the deed was to be cancelled upon the payment of the principal and interest up to the date of the cancellation. The issue is therefore sharply drawn between the parties. The trial resulted in a verdict in favor of the plaintiff. The agreement to pay the six months unearned interest was made by the defendant's husband, and the question is whether there was sufficient evidence to show that the husband had authority to represent the wife in the transaction. The evidence is by no means strong; but upon a careful consideration of the brief of the testimony appearing in the record, we have reached the conclusion that there was at least some evidence to authorize a submission of this issue of agency to the jury, and to sustain a finding in favor of the plaintiff that there was such an agency. The trial judge having approved the verdict, we will not interfere with his judgment overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

SMITH v. CITY OF ATLANTA.

A provision in a city charter, that notice of the introduction of an ordinance "shall be published at least as many as ten days before the adoption of such ordinance," is satisfied by a publication one time at least ten days prior to the adoption of the ordinance.

Submitted June 23,—Decided August 5, 1905.

Affidavit of illegality. Before Judge Lumpkin. Fulton superior court. September 24, 1904.

E. M. & G. F. Mitchell, for plaintiff in error.

J. L. Mayson and W. P. Hill, contra.

COBB, J. An execution in favor of the City of Atlanta against Smith, for an amount claimed to be due as an assessment upon a described lot of land, the property of the defendant in execution, was levied upon the property, and an affidavit of illegality interposed and the papers returned to the superior court of Fulton county for trial. The affidavit set up numerous grounds of illegality, and when the case came on for trial the court, on motion of counsel for the city, struck the affidavit, and the defendant in execution excepted. Only one ground in the affidavit was urged in this court, and therefore our discussion will be limited to this ground. The charter of Atlanta requires, that, "after the first reading of an ordinance providing for a sewer, a notice of the introduction of the same shall be published in one or more of the daily papers of the city." The contents of the notice are provided for in the charter, and it is required that the "notice shall be published at least as many as ten days before the adoption of such ordinance;" and the charter distinctly declares that a substantial compliance with the requirement as to notice shall be sufficient. Anderson's Code of Atlanta, 18, § 46, Acts 1889, p. 958. The ordinance in question was introduced on November 16, 1903. The notice required was first published in a daily paper of the city issued on November 17, and appeared in ten issues of the paper immediately following that date. November 22 was Sunday. It is contended that the charter required that notice shall be published for ten consecutive days, exclusive of Sunday, and that the publication was therefore insufficient. The ordinance was finally adopted on December 7. The case turns upon the proper construction to be placed upon the words, "at least as many as ten days before the adoption of such ordinance." It is said that the use of the word "many" carries with it the idea of continuous publication as to days, whereas if the word "much" had been used, a different construction might have been placed upon the provision. We can not concur in this view. The purpose of the charter was to give notice to those interested in the passage of the ordinance, at least ten days before it was passed, that such an

ordinance was under consideration. In other words, the ten days was the time the party was allowed to investigate the matter after it was brought to his knowledge that a proceeding affecting his property would be passed upon by the city authorities. He was entitled to notice ten days before the action was taken, but he was not entitled to notice every day for ten days. Such a construction of the ordinance is possible without doing violence to any of the words used, is a more reasonable construction than the one contended for by the plaintiff in error, and is in line with prior rulings of this court where similar provisions were under construction. See *Mayor v. Finney*, 54 Ga. 318 (3); *Montford v. Allen*, 111 Ga. 18 (1).

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent, and Lumpkin, J., disqualified.

JORDAN v. BOSWORTH.

Handing to the clerk a petition, with instructions to indorse upon it an entry of filing and to issue process, but "to hold it" until the plaintiff notifies him further, is not a filing of a suit or the commencement of an action, within the meaning of the Civil Code, § 4978, until the instructions are withdrawn; and if the bar of the statute of limitations attaches before the instructions are withdrawn, the suit is barred notwithstanding service was regularly perfected after the withdrawal of the instructions.

Argued June 27,—Decided August 5, 1905.

Complaint on note. Before Judge Reid. City court of Atlanta. February 1, 1905.

Suit was brought upon a promissory note under seal, dated November 10, 1882, and due one day after date. The defendant pleaded the statute of limitations. The facts upon which this plea rested were as follows: On November 10, 1902, the plaintiff went to the office of the clerk of the city court, handed him the original petition, and asked him to file it and issue process, but to hold it in his office until the plaintiff further notified him. The clerk entered upon the petition, "Filed in office this the 10th day of November, 1902," and affixed his signature as clerk, and also issued process at the same time. On November 17, 1902, the plaintiff called at the clerk's office and instructed him "to go ahead with the suit," and then the clerk had pre-

pared a copy and turned the copy and the original over to the sheriff for service, and service was perfected a few days thereafter. The case was not entered upon the docket until November 17. The court overruled a demurrer to the portions of the defendant's answer which set up the foregoing facts, directed a verdict in favor of the defendant, and overruled the plaintiff's motion for a new trial. The exceptions to these several rulings all raise simply the question whether the court was right in holding that under the facts above stated the suit was barred.

Dorsey, Brewster & Howell, for plaintiff.

C. B. Reynolds and *DuBignon & Alston*, for defendant.

COBB, J. The code provides that actions upon instruments under seal "shall be brought" within twenty years after the right of action accrues. Civil Code, § 3765. There is no substantial difference between *bringing* a suit, and *commencing* a suit; and the section may be read as if it had said suit shall be *commenced* within twenty years. The Civil Code, § 4973, provides: "Upon every petition the clerk shall indorse the date of its filing in office, which shall be considered the time of the commencement of the suit." Obviously the proper construction of this section is, not that the *indorsement* of the date of filing by the clerk, but the *actual date of filing*, is to be deemed the time of the commencement of the suit. And there is a very substantial difference between the two things. The clerk may write an entry of filing on a petition, and yet not actually file it in his office. The entry of the clerk is evidence of filing, but not necessary or conclusive evidence of that fact. "A paper is said to be filed, when it is delivered to the proper officer, and by him received, *to be kept on file*." *Peterson v. Taylor*, 15 Ga. 483, quoting from 13 Vin. Abr. 211. See also *Floyd v. Chess-Carley Co.*, 76 Ga. 752 (1); *Laslie v. Laslie*, 94 Ga. 721 (c); *Adams v. Goodwin*, 99 Ga. 138. Nor will notice to the opposing party that a particular pleading will be relied on at the trial dispense with an actual filing of the paper in the clerk's office. *McDougald v. Banks*, 13 Ga. 451. Even the actual filing of the petition will not be regarded as the commencement of the suit, unless followed up by proper service. *McClendon v. Phosphate Co.*, 100 Ga. 219; *Florida Central R. Co. v. Ragan*, 104 Ga. 356; *Nicholas v. Assurance Co.*, 109 Ga. 621. "If there is no service, the plaintiff can not remain in-

active, and, after having been guilty of laches, ultimately move in the cause, and then claim that a suit allowed to remain passive is to be treated as having been commenced as of the time of the filing of the petition." *Cox v. Strickland*, 120 Ga. 114. In the present case, however, process was issued, and service was perfected; and the question for determination is, on what date was the petition filed in the clerk's office?

The law contemplates that when a pleading is filed in the clerk's office, it becomes an office paper of the court in which it is filed, and the party filing it loses control over it in so far as the regular procedure usually pursued in such a case is concerned. A paper filed in the clerk's office must be allowed to follow, without interference from the parties, the usual course of legal procedure, and a party who interferes does so at his peril. If he prevents that being done which is usual and proper, he can not thereafter claim a benefit which would accrue only if regularity had been observed. A plaintiff can not hand a petition to the clerk with instructions to make an entry of filing on it and withhold it from service until further instructions, and afterwards contend that the petition was actually filed when the entry of filing was made. By such conduct he ties the hands of the clerk, makes him merely his agent, deprives him of all official relation to him and the transaction, and official relations do not arise until he removes the bonds. A petition to be filed must be lodged with the clerk, with the understanding that the usual procedure is to be followed, that is, process issued and service perfected. The defendant has no legal notice of the suit until served with a copy of the petition and process; and to make such notice relate back to the time of the commencement of the action, the plaintiff must really *commence his action*, without any reservation as to the time when service shall be perfected. The filing of the petition must be unequivocal and bona fide, and it must not be lodged with the clerk to be held by him until the plaintiff determines whether he really intends to sue or not. A suit, with the right reserved in the plaintiff to say whether it shall really become a suit, is a legal paradox, and one for which we are satisfied there is no authority of law. In *Maddox v. Humphries*, 30 Tex. 494, it was held: "Where the plaintiff filed a petition with the clerk, and endorsed it 'the clerk will not issue upon this until further

instructions by me,' the suit was not properly commenced until the order was given for the citation; and such a deposit or filing with the clerk did not arrest the running of the statute of limitation." See also *Seaver v. Lincoln*, 21 Pick. 267; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341; *Bates v. Smith (Tex.)*, 16 S. W. 47; 1 Cyc. 748. While the cases above cited were dealing with statutes not in all respects like ours, and hence are not exactly in point, they are nevertheless authority for what is a filing, and so are, in principle, in point. There was no error in any of the rulings complained of.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

GEORGIA RAILROAD AND BANKING COMPANY v. NEWMAYER.

COBB, J. No error of law was complained of; and as there was at least some evidence which would have authorized a finding for the plaintiff, the Supreme Court will not disturb a judgment refusing to set aside a second verdict in favor of the plaintiff.

Judgment affirmed. All the Justices concur, except Simmons, C. J., absent.

Submitted June 28, — Decided August 5, 1905.

Action for damages. Before Judge Roan. DeKalb superior court. November 12, 1904.

Joseph B. & Bryan Cumming and M. A. Candler, for plaintiff in error.

Arnold & Arnold and L. B. Norton, contra.

BUDDEN v. BROOKS *et al.*

FISH, P. J. 1. Whenever it appears that the clerk of a trial court has failed to transmit to the Supreme Court, within the time prescribed by law, a bill of exceptions and transcript, and that an attorney for the plaintiff in error "has been the cause of the delay, . . . by consent, direction, or procurement of any kind, the writ of error will be dismissed." Civil Code, §§ 5571, 5572; *Brunswick Book Co. v. Torsch Co.*, 112 Ga. 587; *Ashley v. Howard*, 99 Ga. 132.

2. The bill of exceptions in this case was filed in the clerk's office of the superior court January 27, 1905. The transcript of the record was certified by the clerk April 10, 1905, and reached the Supreme Court the next day thereafter. The clerk of the superior court certified that the delay was

caused by reason of the following facts: On the day the bill of exceptions was filed counsel for plaintiff in error offered to copy the record in order to aid the clerk, and took the record from the clerk's office for that purpose, the copy to be returned for verification. At the time of taking the record counsel for plaintiff in error informed the clerk that counsel for defendant in error had a deed which was necessary to complete the record. The next day the deputy clerk asked counsel for defendant in error about this deed, and was informed by him that the deputy could get it whenever it was needed. On March 31, 1905, the deputy clerk obtained the deed from counsel for defendant in error. On April 7, 1905, counsel for plaintiff in error returned to the clerk's office the original record and a copy thereof. The facts certainly place counsel for plaintiff in error in the attitude of consenting to, directing, or procuring the delay of the clerk in making out and certifying the transcript of the record within the time prescribed by the statute.

Writ of error dismissed. All the Justices concur, except Simmons, C. J., absent.

Argued July 11, — Decided August 5, 1905.

Motion to dismiss the writ of error.

Lavender R. Ray and John C. Reed, for plaintiff in error.

Green, Tilson & McKinney, contra.

Justice CANDLEB was prevented, by providential cause, from participating in the adjudications reported on pages 1-125.

Chief Justice SIMMONS took no part in the other cases of this volume (pp. 125-883), by reason of his fatal illness.

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Negligence, language of Supreme Court as to what would constitute, not appropriate to charge of court. *Atl. R. Co. v. Hudson*, 109; *Mac. R. Co. v. Vining*, 770.

Negligence; rules embodied in Civil Code, §§ 2332, 3830, were not so confused in charge here as to mislead. *W. & A. R. Co. v. Burnham*, 32. See *Macon R. Co. v. Streyer*, 279.

Negligence; whole charge considered in passing on exception to a part, that it did not limit the presumption of negligence to specific acts alleged. *Ga. Ry. Co. v. Reeres*, 698.

Opinion as to what proved, rule forbidding judge to express to jury, not violated by his remark during examination of witness, that a certain question was not in the case, that he had not heard any testimony on it. *Nelms v. State*, 578.

Opinion as to what proved. See catchword "Negligence," *supra*.

Presumed to include all requisite instructions, where not excepted to. *Smiley v. Padgett*, 39.

Presumption of guilt not created by conviction of codefendant, refusal to charge to this effect, error here. *Mizon v. State*, 582.

Prisoner's statement, judge need not charge on theory presented only by, when not so requested. *Renfrow v. State*, 542.

Profane words in presence of female, charge as to. *Roberts v. State*, 505.

Question of law left to jury, not cause new trial, when. *Bedgood-Howell Co. v. Moore*, 336.

"Reasonable certainty;" use of this term in charging in civil case, as to degree of proof and of mental conviction required, discussed. *Warren v. Gay*, 244.

Reasonable doubt; charge that proof of a certain fact could create such doubt, properly refused. *Williams v. State*, 138.

Reasonable doubt, inaccurate definition of. No definition necessary. *Nelms v. State*, 578.

Request for, not authorized by evidence, refusal proper. *McKenzie v. Mitchell*, 72.

Request oral, refusal not cause new trial. *Bedgood-Howell Co. v. Moore*, 336.

Shooting at another, evidence authorized charge on. *Perkins v. State*, 538.

Specific performance of parol contract for sale of land; proper instructions as to degree of proof required. *Warren v. Gay*, 247.

Verdict contrary to specified part of; ground so alleging, in motion for new trial, raised no question for decision. *McWhorter v. O'Neal*, 251.

Whole charge considered in passing on exceptions to a part. *Allams v. State*, 501; *Ga. Ry. Co. v. Reeres*, 698.

CHARITABLE TRUST. See *Trusts*.CHEATING AND SWINDLING. See *Criminal Law*.CHILDREN. See *Criminal Law*; *Estates*; *Parent and Child*; *Wills*.

CHURCH.

Action by or against, where unincorporated, not maintainable, unless certificate of appointment of trustees has been filed as provided in the code; but the church property may be subjected to a debt, by suit against trustees. *Kelsey v. Jackson*, 113.

CHURCH—*continued.*

Debt for pastor's salary and rent of residence for him, church edifice subject to sale to pay. *Id.*

Disturbing congregation. See *Criminal Law*.

Incorporation by filing certificate. *Kelsey v. Jackson*, 114.

Trustees only necessary parties defendant to suit to subject church property here. *Id.* 113.

CITY COURTS.

Americus, jurisdiction as to foreclosure of lien in favor of sawmill proprietor. *Chambliss v. Hawkins*, 362.

Attachments, practice as to, same as in superior court, here; declaration not filed at first term, judgment a nullity. *Callaway v. Maxwell*, 208.

Certiorari from, after dismissal of writ of error, too late, when. 54 *Ga.* 458, distinguished. *White v. State*, 503.

Disqualification of judge to preside on trial of accusation in, whether it disqualifies from attesting affidavit to the accusation, not decided; does not authorize another judge to attest, under act creating court here. *Edmondson v. State*, 195.

Equitable amendment to claim, city court had no jurisdiction to entertain. *Ragan v. Standard Scale Co.* 14.

Equitable plea purely defensive, the sustaining of which would result simply in a general verdict for defendant, may be entertained by. *House v. Oliver*, 784.

Foreclosure of liens, jurisdiction as to. *Chambliss v. Hawkins*, 361.

Moultrie, writ of error lies from. *Jones v. State*, 129.

Writ of error lies from, when. *Id.*

CLAIM. See *Garnishment*.

Burden on claimant to prove title, on proof of possession in defendant since judgment. *Rountree v. Gaulden*, 452.

Declarations of defendant in fl. fa., when admissible; proper charge to jury where there is conflict of evidence as to his possession when they were made. *Smiley v. Padgett*, 39.

Defects in pleadings, when claimant may attack. *Callaway v. Maxwell*, 208.

Equitable amendment to, city court had no jurisdiction to entertain. *Ragan v. Standard Scale Co.* 14.

CODE.

Construction; section presumed to be simply declaratory of existing law, when not clearly indicating intent to establish a new rule. *Turner*, 8, 9.

CODE SECTIONS—CIVIL

226. A notary public and ex-officio justice of the peace whose resignation has been accepted continues in office until his successor is appointed and qualified. *Rates v. Bigby*, 731.

340. Judicial notice taken that a county is a body corporate. *Taylor v. State*, 136.

345. Advertisement here was not too indefinite, and substantially complied with this section. *Anderson v. Newton*, 513.

396. Discretion of county commissioners in determining as to necessity of buildings, selection of site, etc., not interfered with unless in clear case of abuse. *Id.* 522.

CODE SECTIONS—CIVIL—*continued*.

- 520-22. Certiorari lies to review action of county commissioners establishing road. Injunction not granted to prevent such action. *A. & W. P. R. Co. v. Redwine*, 736.
- 573-88. Not repealed. These sections and subsequent acts construed. *Maxwell v. Willis*, 319.
821. What recitals sufficient in execution for wild-land tax, issued under act of 1874. *Bennett v. So. Pine Co.* 623.
909. See next note. Effect of tender for redemption. *Id.* 621.
910. One who, after record of tax deed, redemption, and expiration of redemption period, bought from the vendee, without notice of redemption, acquired no title, though the owner had not taken a reconveyance. *Id.* 622.
918. Effect of tax deed. *Id.*
- 1838-1408. See *Schools*.
1546. Whether the General Assembly may constitutionally confer on the superior court jurisdiction to hear and determine election contests. *Ogburn v. Elmore*, 677, 681.
A proceeding hereunder can not be annexed to a suit at law or in equity, and such a suit can not be converted by amendment into a proceeding hereunder. *Id.* 677.
1694. Mandamus to compel county commissioners to consent to the transplanting of oysters. Facts required that the case be submitted to a jury. *Comms. of McIntosh County v. Aiken Canning Co.* 647.
1824. Jurisdiction to appoint guardian of child, when not in ordinary of county in which the child lives. *Hayslip v. Gullis*, 266.
1827. See 1824, *supra*.
1860. Petition of minority stockholders, good as against demurrer here. *Weslosky v. Quarterman*, 316.
1890. Bill of exceptions not served on corporation by leaving copy at residence of agent or officer. *Anderson v. Albany R. Co.* 319.
1900. A private business corporation created under Georgia law, with its principal office in a certain county, is not suable in another county for a tort committed there, when it has no agent, agency, or place of business there. *Tuggle v. Enterprise Co.* 481.
- 1903-11. Stockholder's individual liability under charter. See *Banks*.
2102. Assigning fire-insurance policy without insurer's consent, not invalidate it, when assigned after loss under it; assignment valid though purporting to be made subject to such consent. *Ga. Co-op. Fire Asso. v. Borchardt*, 183.
2105. See 2102, *supra*.
2279. Action for injuries to dead body in transportation, good as against demurrer. *L. & N. R. Co. v. Wilson*, 71.
2821. Imposes burden of proving the observance of such diligence as was due, not that none was due. *Hall v. W. & A. R. Co.* 213.
This section is a rule of evidence, and does not dispense with specific allegations as to negligence. *So. Ga. Ry. Co. v. Ryals*, 332.
Cited. *White v. So. R. Co.* 358.
Applied, as to presumption of negligence, where one stepping from a car, which had been stopped to transfer him to another car, was injured by reason of the turning out of lights or a jerk of the car. *Ga. Ry. Co. v. Reeves*, 705.

CODE SECTIONS — CIVIL — *continued.*

2322. This section and § 3830 were not so connected in charge of court as to mislead jury. *W. & A. R. Co. v. Burnham*, 32.
- 2355-7. Where no certificate of appointment of trustees of an unincorporated church has been filed, it is not suable as an entity, but the church property may be subjected to a debt, by suit against trustees holding title to it. *Kelsey v. Jackson*, 113.
2361. Church edifice subject to sale to pay debt incurred for pastor's salary and rent of residence for him. *Id.* 114.
2457. Judge's discretion as to sum to be allowed for attorney's fees, on application hereunder. He may fix amount without evidence specifying any amount as value of services. *Sweat*, 801.
2459. Revision of order for temporary alimony must be based on a change of circumstances, occurring after the order has been granted; no sufficient reason here. *Sumner*, 120.
2467. Writ of ne exeat granted to wife against husband, pending application for alimony and prior to decree therefor; discretion of judge as to amount of bond. *Lamar*, 827.
2516. See 1824, *supra*.
2610. Rule as to assumption of risks of employment, stated. *Crown Mills v. McNally*, 38.
- 2611-12. Cited in case of employee injured by machine in cotton mill, where it was alleged that the danger was concealed by cotton. *Id.* 37.
- 2608, par. 4. Description in contract of sale: "424 acres of land in Tattnall county, . . . to include my share of the crops now growing on said land," too indefinite to meet statute of frauds. *Tippins v. Phillips*, 417.
- 2694, par. 3. See 4039, *infra*.
- 2716-22. Not suspended by U. S. bankruptcy act, where no proceeding under that act. Effect of provision as to recommending discharge. Dictum in 69 *Ga.* 491, criticised. *Boston Mercantile Co. v. Ould-Carter Co.* 458.
2743. Decision construing, as to service, referred to in connection with 5380, *infra*.
In foreclosure hereunder, issuance of process by clerk as in ordinary suits is not necessary; rule nisi is process. *Montgomery v. King*, 14.
2745. Where foreclosure is in name of mortgagee, for use of assignee, the terms of the assignment need not be set out. *Id.*
2801. See 2807, 6176, *infra*. Construed strictly. Lien prior to act of 1899 had to be asserted against true owner, and the statutory notice given to him. *Reaves v. Meredith*, 444.
2804. Cited in connection with 2801, *supra*. *Arnold v. Farmer's Exchange*. 733.
2807. Jurisdiction of courts other than superior court as to foreclosure of sawmill lien on product of the mill. *Chambliss v. Hawkins*, 362.
2816. See 2807.
- 2863-4. Waiver good as to personalty claimed as exempt hereunder, where not set apart by the ordinary in the manner prescribed as to the homestead allowed by the constitution. Ruling in 68 *Ga.* 252, followed, but doubted. *Miller v. Almon*, 104.

CODE SECTIONS—CIVIL — *continued.*

2884. Action here was on policy, notwithstanding allegation that there was a written adjustment of the loss, which created a liquidated demand. *Ga. Co-op. Fire Asso. v. Borchardt*, 185.
2896. Burden on carrier to account for default, where baggage not delivered on demand. *So. R. Co. v. Edmundson*, 477.
2899. In a suit for injury to a passenger from a negligent jerk of the train, the nature of the train, whether passenger, freight, or mixed, should be considered, in determining whether extraordinary diligence was used. *So. R. Co. v. Cunningham*, 94.
2966. Distinction between liability of surety and that of guarantor. Contemporaneous agreement, written under the contract of another, to "guarantee" its fulfilment, not resting on an independent consideration, was one of suretyship. *Fields v. Willis*, 275.
2969. Accommodation indorsers liable to contribute as sureties. *Bigby v. Douglas*, 637.
2974. Cited. *Fields v. Willis*, 275.
2986. Difference between subrogation hereunder and equitable subrogation. *Ragan v. Standard Scale Co.* 16.
2992. Codified from the common law. Limitation of actions hereunder. *Bigby v. Douglas*, 635.
3023. See 3535, *infra*.
- 3024-5. Undisclosed principal (wife) receiving benefit of goods sold to husband, liable to vendor. *Pinkston v. Cedar Hill Co.* 303.
Rule that undisclosed principal is liable for contract of agent does not apply when the contract is under seal. *Van Dyke*, 688.
3084. Construed as to declarations of deceased agent; did not change prior law. 56 *Ga.* 638, not followed. *Turner*, 5.
3083. Bequest to daughter's children, with provision that the share of any of them dying without a child should revert to the survivors, created an estate in fee, subject to be divested; no remainder taken by their children. *Hill v. Terrell*, 57.
3116. Distress not lie where one of the parties entered under a third person holding adversely to the other. *Sims v. Price*, 97.
Facts here did not give rise to implication of tenancy. *Sharp v. Mathews*, 798.
3118. Landlord's liability for injury from defective construction or disrepair of rented house. Sufficiency of allegations in suit for damages. *Veal v. Hanlon*, 642; *Ross v. Jackson*, 668.
3123. See 3118, *supra*.
3178. See 4008, *infra*.
3195. See 4008, *infra*.
3197. See 4008, *infra*.
3199. See 4008, *infra*.
3202. See 2355, *supra*.
3258. The latter part of this section is not applicable where the property is devised to one of the testator's sons and the son's wife and children. *Credille*, 673.
3288. Duty of ordinary, on information that a will exists, to require that it be filed in his office. *Harrell*, 269.
3317. Joint act of all coexecutors, necessary to execute special trust created by the will. *Hosch Lumber Co. v. Weeks*, 340.

CODE SECTIONS—CIVIL—*continued.*

3330. Construed. Bequest to B and her children is to a class consisting of B and such of her children as survive the testator. If B survives and has no child in life at his death, she will take the whole estate, though there be issue of her children. *Davis v. Sanders*, 177.
- 3355, par. 1. Widow claiming right to recover hereunder, nonsuited, where evidence showed she had paid some of her husband's debts before and some after bringing suit. *Jackson v. Green*, 254.
3394. Meaning of "all concerned." *Mathews v. Rountree*, 327.
3467. A caveat to an application for year's support may be interposed by a cosurety of the decedent on a bond on which suit has been brought. *Id.* 328.
3535. Cited in discussing effect of accepting offer made in telegram, where there is a mistake in transmission, as to terms. *Gen. R. Co. v. Gortatowsky*, 374.
3536. Duress by attorney obtaining note by threat that unless given he would postpone trial and keep in jail indefinitely the maker's son, a prisoner he had been employed to defend. *Bailey v. Devine*, 655.
3542. Sale was by acre, where the entire description was: "333 acres in the southeast corner" of a specified lot. *Strickland v. Hutchinson*, 896.
3594. The provision herein as to possession originating in fraud does not prevent a deed fraudulent as against creditors from operating as color of title as against persons not affected by the fraud. *Moore v. Mobley*, 424.
3599. Rule allowing proof of consideration different from that expressed in a contract does not apply where the consideration expressed is mutual promises therein. *Wellmaker v. Wheatley*, 203.
3618. Record of tax deed, as affecting one buying from the grantee after redemption. *Bennett v. So. Pine Co.* 623.
3628. Deed without corporate seal, not admissible as deed of corporation, without proof of signer's authority. *Bale v. Todd*, 103.
3634. See 3024, *supra*. Presumption as to consideration of sealed contract (note); authorities discussed. *Van Dyke*, 691.
3638. See 910, *supra*.
3660. See 3535, *supra*.
3670. See 3536, *supra*.
3673. Reservation made in habendum clause, but not referred to in granting clause, was not void for repugnance. *Collinsville Co. v. Phillips*, 838.
- 3675, par. 1. Parol proof inadmissible to graft condition on note. *Union Cen. Ins. Co. v. Wynne*, 470.
3702. Chattel mortgage invalidated by mortgagee's fraudulent insertion of more property. *Bedgood-Howell Co. v. Moore*, 336.
3703. That the court left the materiality of an alteration to the jury is not cause for a new trial, when, if it was made, it was unquestionably material, and the jury found it was made. *Id.*
3712. Rule as to restoration of original status, as condition of rescission and suit for money paid under contract, not apply to pupil suing teacher for breach of partly performed contract to impart instruction. *Timmerman v. Stanley*, 854.

CODE SECTIONS—CIVIL—*continued*.

3765. See 3024, 3634, *supra*. "Brought," in this section, means "commenced." Suit not commenced when petition was delivered to clerk with instruction to indorse entry of filing and hold until further notice. *Jordan v. Bosworth*, 879.
3766. Construed. Not applicable to suit of surety to compel contribution. *Bigby v. Douglas*, 638.
3767. See 3024, 3634, *supra*.
3799. See 3806, *infra*. Insufficient allegations as to special damage, in suit for breach of contract of purchaser of bank stock, not to sell without offering to resell to the vendor; nominal damages recoverable. *Cothran v. Witham*, 198.
3801. See 3799, *supra*.
3802. Judge should not tell jury what particular acts ordinary care would require one to do in order to lessen damage. *So. R. Co. v. Cunningham*, 96.
3806. Expenses in preparing for hearing of case before arbitrator, when recoverable in action for breach of contract for arbitration. *McKenzie v. Mitchell*, 75.
3811. Waiver of tort, and suit *ex contractu* against one converting personality, when allowed and when not. *Bates v. Bigby*, 729.
3830. See 2322, *supra*.
3840. What must appear, to sustain defense of privilege hereunder. Cited as to publication of circular posted in railway offices, instructing conductors not to honor certain tickets not surrendered by a discharged conductor. *Sheftall v. Cen. R. Co.* 592.
Statements broader or more widely published than the interest to be subserved demands are not privileged hereunder. *Id.*
- 3841-42. See 3840, *supra*.
3940. Did not apply in favor of one buying land, without notice of redemption, from one who bought at tax sale, though the owner, who redeemed it, took no reconveyance. *Bennett v. So. Pine Co.* 625.
3950. Applies, as to rebuttal of answer, only where discovery is prayed for. *Toomer v. Warren*, 477.
3974. See 3535, *supra*.
- 3981-5. See 3535, *supra*.
- 4008-9. Superior court has plenary power over trusts for educational purposes; judge may fill vacancies in trusteeship where no provision therefor is made by grant or legislative act; this done on petition of beneficiaries. *Thompson v. Hale*, 311.
4039. Naked promise in parol not enforced against promisor, though he encouraged promisee to expend money on the faith of it, the expenditure being for his own benefit, not that of promisor, who was not benefited. *Swan Oil Co. v. Linder*, 550.
4045. Whether a judge disqualified to preside on the trial of an accusation is disqualified to attest an affidavit to it, not decided. *Edmondson v. State*, 195.
4130. Does not apply to a suit against a common carrier for loss of or damage to goods. *Lowe Co. v. Central R. Co.* 712.

CODE SECTIONS — CIVIL — *continued.*

4198. See 2807. The words "save where exclusive jurisdiction is vested in the superior court" refer to cases enumerated in the constitution. *Chambliss v. Hawkins*, 363.
4198. Practice in county court, similar to that in superior court. *So. Ga. Ry. Co. v. Ryals*, 322.
4204. See 4193, 4198.
4208. See 4193.
4214. Applies to suits for money; appeal from county court not lie in proceeding to evict intruder; remedy is certiorari. *Rigell v. Sirmans*, 456.
4215. See 4214, *supra*.
4324. The provision herein as to ten days notice applies only where no order is passed in term fixing a time in vacation for hearing the motion for new trial. *Gould v. Johnston*, 765.
4334. Jury's province invaded, in action for negligence, by charge as to duty of railroad company. Use of certain language by Supreme Court not make it proper in charge. *Atl. R. Co. v. Hudson*, 109.
4453. Proceeding in county court to eject intruder can not be carried to superior court by appeal. *Rigell v. Sirmans*, 457.
4529. Attachment affidavit and bond sufficient here. *Graves v. Rivers*, 224.
4556. Judgment in attachment case was a nullity, where no declaration was filed at the first term. *Callaway v. Maxwell*, 209.
- 4581-4601. When necessary to set out evidence in connection with exceptions to auditor's report, or point out where it is to be found in his brief of evidence. *First State Bank v. Avera*, 598.
Discretion of auditor as to allowing amendment after he has heard case and before he has made his report, or as to reopening case. *Id.* 602.
4593. Exception of law "as to matters not appearing on the face of the record," not proper mode of attacking report for omissions; remedy is application for order to recommit. *Collinsville Co. v. Phillips*, 835.
4624. Onus on claimant to prove title, on proof of possession in defendant since judgment. *Rountree v. Gaulden*, 452.
4637. Papers which should be sent up with answer to certiorari. *Brown v. Atlanta*, 499.
4651. Discretion of court as to allowing time to prepare traverse to answer. *Folds v. State*, 168.
4720. One filing a claim hereunder becomes a party to all subsequent proceedings in garnishment, and may take advantage of any defect in the pleadings of his adversary. *Callaway v. Maxwell*, 209.
4723. See 4720, *supra*.
4762. Cited in discussing remedy of owner of property injuriously affected by nuisance in street, caused by construction of railroad tracks, etc., where city authorities refuse to take steps for its abatement. *Coker v. Atla. R. Co.* 492.
4808. Cited. *Rigell v. Sirmans*, 456.
4810. See 4193.
4811. Cited. *Rigell v. Sirmans*, 456.

CODE SECTIONS—CIVIL—*continued*.

4813. Cited. *Rigell v. Sirmans*, 456.
Dispossessory warrant not available where title is in issue. *Sharp v. Mathews*, 797.
4823. A forcible-entry proceeding hereunder is, after service of the required notice, a "pending proceeding" under § 4950, which will authorize an injunction at the instance of defendant, in the county in which it is pending, though plaintiff reside in another. *Ellis v. Stewart*, 242.
- 4833-35. See 5098, *infra*.
4843. Suit by next friend, for insane person, not disclosing that there was no guardian, and not alleging reason for suing by next friend, dismissed on special demurrer. *Stanley*, 124.
4850. Jury's recommendation as to who shall pay costs in an equitable proceeding, not binding on judge. *Strickland v. Hutchinson*, 399.
4855. Where husband of beneficiary under will probated before 1866 had taken no step to enforce marital rights, his consent did not authorize exercise of jurisdiction hereunder. *Callaway v. Irvin*, 349.
4870. See 1694, *supra*.
4927. Requirements hereof as to abstract of title, etc., do not apply where this section is not relied on by plaintiff seeking injunction against cutting timber, on the ground that the defendant is insolvent and the damage would be irreparable. *Fletcher*, 326.
Where injunction is sought hereunder, defects in the title papers can not be aided by aliunde proof. *Lanier v. Hebard*, 631, 634.
On an interlocutory hearing, where the admissibility of a paper offered as a link in plaintiff's chain of title was dependent on subsequent evidence, it was not error to admit it conditionally. *Id.* 626.
Plaintiff not showing title, not entitled to injunction, though it be shown that the threatened damage would be irreparable, and that an injunction would prevent a multiplicity of suits. *Id.*
4929. Cited in discussing right of action for injury to dead body. *L. & N. R. Co. v. Wilson*, 70.
4936. Implied obligation of parent to pay for services of adult daughter. *Phinazee v. Bunn*, 235.
4950. See 4823, *supra*.
4963. See 2745, *supra*.
4966. Attorney's affidavit to petition for injunction, that of his own knowledge the recitals of fact therein are true, sufficient. *Boston Mercantile Co. v. Ould-Carter Co.* 464.
4973. See 3765, *supra*.
4974. See 2743, *supra*.
4985. Scire facias is not an original action; service by leaving copy at residence is insufficient. *Atwood v. Hirsch*, 735.
5002. See 4927, *supra*.
5008. To recover on grantor's possession, it must appear that he was in possession when the deed was made. *Priester v. Melton*, 377.
5070. Default entry defaced by judge running pen through it, treated as inadvertent. *Albany Pine Co. v. Hercules Mfg. Co.* 271.
5072. See 5070, *supra*.

CODE SECTIONS—CIVIL—*continued.*

- 5097-98. Action on homestead-waiver note amendable by alleging that before suit the defendant was adjudged bankrupt and certain property set apart as exempt, and praying for special judgment against that property. *Wright v. Horne*, 87.
- Cause of action not changed by amendment correcting inadvertent misdescription of land, in petition for specific performance on parol contract to convey. *Sweat v. Hendley*, 335.
- Where the action was for injury to a passenger in stepping from a car, a new cause of action was not added by an amendment adding to previously specified acts of negligence a negligent jerk of the car. *Ga. Ry. Co. v. Reeves*, 702.
5102. Objection to misnomer of defendant corporation waived by appearance and pleading to merits by true name. *Comms. of McIntosh Co. v. Aiken Canning Co.* 650.
5126. See 5136, *infra*.
5186. Due diligence not shown by party seeking continuance on account of non-return of interrogatories. *Thompson v. Hays*, 112.
5148. See 340, *supra*.
5160. Cited. *Jackson v. Green*, 255.
5165. Proper charge to jury on positive and negative testimony. *Nelms v. State*, 576.
5176. Where it was sought to justify homicide on the ground that deceased was seeking to ruin defendant's minor daughter, evidence of her notorious character for lewdness was admissible in rebuttal. *Gossett*, 430.
- Declarations of purchaser of goods on credit, made to the creditor, that he had made certain misrepresentations to obtain them, admissibility of, on trial of issue as to whether the return of the goods was an illegal preference. *Silvey v. Tift*, 804.
5179. See 5176, *supra*. Evidence that a declaration was made "immediately" after an act in question was too indefinite as to time, to make it admissible as part of the *res gestæ*. *Pool v. Warren County*, 206.
5181. Cited in discussing admissibility of declarations of deceased agent. *Turner*, 8.
- 5182, 5192. See 5181, *supra*.
5198. Wife of plaintiff in suit for personal injuries was not incompetent to testify as to the nature of the injuries. *Mac. R. Co. v. Mason*, 780.
5237. Judge's certificate that clerk's attestation is in due form, necessary. *Conrad v. Kennedy*, 242.
5269. Neither party to an action for breach of promise of marriage is a competent witness on the trial. *Graves v. Rivers*, 229.
- Lessor in second demise in ejectment, who had conveyed his interest to lessor in third demise, was competent to testify as to transactions with deceased lessor in the first demise. *Priester v. Melton*, 375.
- Grantee sued by grantor's administrator, in a proceeding to cancel a deed, incompetent to testify as to services rendered by him and his children as consideration for the deed. *Parker v. Ballard*, 441.

CODE SECTIONS—CIVIL—continued.

5272. See 5289, *supra*.
5287. One not a licensed physician may testify as an expert on a medical question, when it appears that his studies and experience qualify him to do so. *Mac. R. Co. v. Mason*, 778.
5314. Counsel can not, unless authorized by order of court, take from the clerk's office interrogatories not properly returned, and send them back to commissioners, to be properly returned. *White v. So. R. Co.* 357.
- 5315-17. Deficiencies in formal requisites hereunder, not supplied by counsel's statement in court. *Hosch Lumber Co. v. Weeks*, 341.
Where plaintiff gave notice that depositions would be taken at a stated time and place, and failed to appear, depositions then and there taken without notice to him, on what was called "cross-examination," were not admissible. *Id.*
5331. Error to direct verdict here. *Cen. R. Co. v. Gortatowsky*, 371.
- 5355, par 1. Does not apply when there is a paper apparently executed in due form as the husband's will, unless there is a judgment that it is not his will. *Harrell*, 267.
- 5380-82. Service by leaving copy of scire facias at residence, insufficient; the service must be personal. *Atwood v. Hirsch*, 736.
5475. Service of rule nisi must be made, unless waived, though returnable at the term of the trial. Intimation in 89 Ga. 782, disapproved. *McMullen v. Citizens Bank*, 400.
No specific time for service of rule nisi on motion for new trial is required by law; what is a reasonable time for such service. *Gould v. Johnston*, 767.
5484. Presentation and filing of brief of evidence, at hearing of motion for new trial, after the term of the trial, was authorized, under orders passed in term here. *Id.* 768; *Cross v. Coffin-Fletcher Co.* 818. "Present for approval" included filing. *Id.* 819.
5487. Provision as to 20 days notice of application for new trial applies only to extraordinary motions. *Gould v. Johnston*, 767.
5488. Cited in discussing decisions of less than six Justices. *Edwards v. State*, 544.
5526. Judgment overruling motion to dismiss caveat to year's support is reviewable by independent writ of error; exceptions to allowance of amendment to caveat, or as to continuance, are not reviewable until final judgment. *Mathews v. Rountree*, 330.
Judgment on motion for new trial of the issue formed by traverse to answer to certiorari, not cause for independent writ of error. *Du Vall v. Brogden*, 411.
Final adjudication not made by refusal to allow general demurrer to petition to be amended. *Henderson v. State*, 465.
- 5526-27. Cited in connection with 6241, *infra*.
5529. Agreement of counsel will not cause Supreme Court to treat as a brief of evidence a stenographic report not approved by trial judge. *George v. State*, 504.
5547. See 1899, *supra*.

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5569. Sufficiency of assignment of error (injunction case); former decisions collected. *Anderson v. Newton*, 518.
- 5571-72. Delay in transmitting transcript of record, held to have been caused by counsel; writ of error dismissed. *Budden v. Brooks*, 882.
5605. Assignment of error, as to order overruling motion for new trial: "to which order defendant excepted and now excepts and assigns the same as error," sufficient. *Rigell v. Sirmans*, 455.
5637. New trial required because court limited argument in misdemeanor case to less than 30 minutes. *Jones v. State*, 181.
5668. Cited. *Cross v. Coffin-Fletcher Co.* 820.
5698. Cited in connection with 226, *supra*.
5718. Not apply to alimony. *Lamar*, 829.
5779. Act to be amended was sufficiently described as "an act incorporating" a named town, approved on a given date; and this title was broad enough to cover anything germane to a town charter. *Town of Poulan v. A. C. L. R. Co.* 609.
5835. Cited in discussing scope, origin, and purpose of writ of error. (Dissenting opinion.) *Henderson v. State*, 750.
5842. Jurisdiction of superior court is not exclusive as to foreclosure of liens in favor of proprietors of sawmills. *Chambliss v. Hawkins*, 361.
5851. Where an act creating a city court provided that affidavits to accusations therein should be made before the judge thereof, his disqualification to preside did not authorize another judge to attest the affidavit. *Edmondson v. State*, 196.
5856. Suit for value of blankets delivered to defendant to be cleaned, which were not returned, was a case arising *ex contractu*. *Bates v. Bigby*, 728.
5914. See 2863, *supra*.
6176. See 2801, *supra*. Materialman not entitled to lien as against owner, where material is furnished on employment of contractor whose contract is with a lessee, and who has no contractual relation with the owner. *Pittsburgh Co. v. Peters Co.* 723.
- In proceeding hereunder, plaintiff need not negative defenses: allegation of compliance with the statute, and that he comes under its protection, sufficient. *Arnold v. Farmers Exchange*, 731.
6186. See 3950, *supra*.
6200. See 5269, *supra*.
6225. Refusal to postpone trial in order to give further time for notice of traverse to answer, and dismissal for want of notice, affirmed. *Sims v. Price*, 98.
6241. Direct exception without motion for new trial, not allowed as to rulings not shown to have necessarily controlled verdict. 119 *Ga.* 395, disapproved. (See dissent.) *Henderson v. State*, 739.
6675. Sufficiency of indictment hereunder; material parts of the instrument should be set forth. *Taylor v. State*, 133.

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- 64-65. Passion on the part of the slayer is an essential element of voluntary manslaughter. Passion on the part of the person slain had no bearing on the grade of homicide here. *Rentfrow*, 541.
70. See 75, *infra*. Refusal to charge jury as to when homicide would be "excusable," proper. *Mizon*, 584.
71. See 75, *infra*. Properly given in charge here. *Grimes*, 754.
72. See 75, *infra*.
73. See 75, *infra*. Should not be given in charge when there is nothing in the evidence or in the defendant's statement to support the theory of mutual combat. *James*, 548.
74. Meaning of, discussed. Error, to give in charge here. *Gossett*, 481.
75. One may kill to protect minor daughter from seduction or debauchery in progress or about to take place, but not for past injury. *Id.*
114. Not violated if the child be provided for by others. *Mays*, 507.
155. Venue, under indictment for simple larceny, established by proof that the accused carried the stolen property into the county in which it was alleged to have been stolen. *McCoy*, 143.
342. Assemblage of 400 at barbecue on public holiday was a "public gathering." *Wynne*, 566.
Violated where one carried into public gathering a weapon from a house near by, at which he had deposited it in order to have it at hand when the gathering should occur. *Id.*
343. Conviction hereunder upheld. *Skrine*, 172.
398. Defines but one offense; indictment in two counts, one as to maintaining gaming-house, the other as to renting for gaming, not demurrable for misjoinder of offenses. *Bashinski*, 508.
Indictment for renting house for gaming need not name tenant. *Id.*
401. Indictment charging conjunctively different kinds of gaming ("cards, dice, and balls"), supported by proof of one kind. (Dissent.) Not demurrable. *Hubbard*, 17.
418. Violated by shooting pistol near congregation while they were at dinner on the church grounds. *Folds*, 167.
431. No conviction hereunder in a county where sale prohibited altogether under a valid statute; aliter where the prohibition is by an unconstitutional statute. *Edwards*, 542.
511. Indictment hereunder need not allege that the car belonged to a chartered railroad company. *Allen*, 499.
520. Cited in connection with 511, *supra*.
751. An oral demand for indictment, made by counsel, is insufficient. *Shivers*, 538.
767. Discretion of court as to allowing time to prepare traverse to answer. *Folds*, 168.
811. Disqualification of grand juror, when waived by failure to challenge before indictment found. *Id.*
929. Cited in discussing sufficiency of indictment for forgery. When material parts of instrument should be set out. *Taylor*, 136.
The form of indictment herein need not be followed literally; not necessary to state place of residence of accused. *Tarver*, 494.

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984. Instruction that the jury would be authorized to find the accused guilty unless there be some other hypothesis as reasonable as that he committed the act, error. *Campbell*, 537.
992. Proper instructions as to alibi. Defense of alibi not set up by contradicting evidence as to presence of accused at another place than the scene of the homicide. *Williams*, 141.
1070. Cited in connection with 6241, *supra*.
1107. A county is not liable for the sheriff's costs allowed herein for conducting prisoner before court. *Hall County v. Gilmer*, 173.

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- Authority for, under town charter; constitutionality of provisions as to. *Town of Poulan v. A. C. L. R. Co.* 605.
- Compensation; condemnation provisions in town charter silent as to mode of ascertaining damage and as to prepayment, not unconstitutional; the general law covers this. *Id.*
- Damages, general as to, by implication part of special act. *Id.*
- Injunction against. *Id.*
- Necessity for taking, discretion of municipal corporation to determine, when not interfered with. *Id.*
- Street across railroad, not inconsistent use. *Id.*
- Street across railroad, power of condemnation for purpose of opening, under general condemnation provisions in town charter. *Id.*

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- Note executed and made payable in another State by a citizen of this State is governed, as to validity and effect, by the *lex loci*. *Bailey v. Devine*, 653.
- Prestumed that the common law prevails in another State, where the contrary not shown. *Id.*; *So. R. Co. v. Cunningham*, 90.

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- Amendment of statute. See *Statutes*.
- Condemnation of property. See *Eminent Domain*.
- Courts, whether legislature may add to constitutional powers of, by conferring jurisdiction to try contested-election cases. *Ogburn v. Elmore*, 677, 681.
- Demurrer general, not raise question of. *Henderson v. State*, 466.
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- Imprisonment for debt, prohibition of, not apply to alimony. *Lamar*, 829.
- Question as to constitutionality of act under which accusation was framed, not passed on, where the accusation was fatally defective. *Oglesby v. State*, 506.
- Question of, not raised by general demurrer. *Henderson v. State*, 466.
- Special act in conflict with general law (act prohibiting sale of liquors in Jefferson county), invalid. *Edwards v. State*, 542.
- Special laws, provision as to, when not violated by legislation authorizing a city to punish for an act made penal under State law. *Littlejohn v. Stells*, 427.

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Subject-matter, more than one, not contained in act incorporating railroad company here. *Bonner v. Milledgeville R. Co.* 115.

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Action construed to be for recovery of money paid under, and not for breach. *Timmerman v. Stanley*, 854.

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Agent's, under seal, undisclosed principal not bound by. *Van Dyke*, 686.

Alteration, materiality of, a question of law; fact of alteration, a jury question; leaving question of materiality to jury, not cause new trial, when. *Bedgood-Howell Co. v. Moore*, 333.

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Arbitration, stipulation as to, in building contract, construed; not made condition precedent to suit. *Adams v. Haigler*, 659, 666.

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Breach of (architect's), allegations in action for, too indefinite as to performance of plaintiff's part of, and as to damages. *Golucke v. Lowndes County*, 412.

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Breach of, claim inconsistent with suit for. *Timmerman v. Stanley*, 850.

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Consideration, mutual promises; one party not bound unless the other is bound. *Cooley v. Moss*, 707.

Consideration, presumption as to, from seal. *Id.* 710; *Van Dyke*, 690.

Consideration; rule allowing proof of one different from that expressed in the contract, applies when; not where the consideration expressed is mutual promises therein. *Welmaker v. Wheatley*, 201.

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Consideration wanting for promise to make deed to right of way; not aided by the fact that land was bought from others on the faith of the promise. *Swan Oil Co. v. Linder*, 550.

Consideration. See *Promissory Notes*.

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Disaffirmance of, by suit to recover money paid thereunder. *Timmerman v. Stanley*, 854.

Duress by attorney obtaining note by threat that unless given he would postpone trial and keep in jail indefinitely the maker's son, a prisoner he had been employed to defend. *Bailey v. Devine*, 653.

Frauds, statute of, as affecting. See *Frauds, Statute of*.

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Illegal, contract to get witnesses out of the way. *Bailey v. Devine*, 656.

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Offer not bind unless accepted; effect of mistake as to terms of. *Cen. R. Co. v. Gortatowsky*, 366.

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Option to buy, contract for, not unilateral. *Cothran v. Witham*, 190.

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Rescission; one can not in the same action sue for damages for breach of a contract, and treat it as rescinded and sue for money paid under it. *Timmerman v. Stanley*, 850.

Rescission; rule as to restoration of original status, as condition of suit for money paid under contract, not apply to pupil suing teacher for breach of partly performed contract to impart instruction. *Id.*

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Time when operative, agreement here not void for indefiniteness as to. *Cothran v. Witham*, 190.

Unilateral; acceptance not in time to bind. *Cooley v. Moss*, 712.

Unilateral; agreement of purchaser of bank stock, not to sell it without offering to resell to the vendor, was not unilateral. *Cothran v. Witham*, 190.

Unilateral; A not bound by his agreement to sell land to B at a stated price, where nothing was paid and no obligation was assumed by B, and no other consideration appeared. *Cooley v. Moss*, 707.

Unilateral, promise here to give deed to right of way was. *Swan Oil Co. v. Linder*, 550.

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- Franchises, surrender of, whether effected by petition of stockholders and order of court against surrender. *Boston Mercantile Co. v. Ould-Carter Co.* 463.
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- Knowledge of officers was notice to. *City of Elberton v. Pearle Mills*, 1.
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- Advertisement for bids to build and furnish court-house, what sufficient. *Anderson v. Newton*, 513.
- Bond election, or taxation; discretion of county authorities as to mode of providing for cost of building; decision not reviewable. *Id.*
- Bridge, suit against county for injury from defect in; verdict for county authorized, where evidence was conflicting as to whether it was built before adoption of act of 1888. *Pool v. Warren County*, 205.

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Abandoning child not penal if his wants be provided for by others. *Mays*, 507.

Accusation, date of crime in, need not be that alleged in warrant. *Shivers*, 538.

Accusation, whether judge disqualified to preside on trial is disqualified to attest affidavit to, not decided; another judge could not attest, under city-court act here. *Edmondson*, 194.

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Alibi, proper instructions to jury as to. *Williams*, 141.

Allegata and probata; indictment charging conjunctively different kinds of gaming ("cards, dice, and balls"), supported by proof of one kind. (Dissent.) *Hubbard*, 17.

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Assault to rape; conviction set aside because court failed to charge as to assault and assault and battery. *Sutton*, 125.

Assault to rape; evidence authorizing a finding that there was an assault with intent to gain consent to sexual intercourse, but not to commit rape. *Id.*

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- Assault with fist, not justify stabbing, unless in case of great inequality between the combatants. *McEvoy*, 506.
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- Character, good, of accused, proper charge as to. *Nelms*, 576, 577.
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- Cheating and swindling by contracting to perform service; accusation under act of 1903, charging that accused fraudulently procured from prosecutor a stated sum, "or the value thereof," demurrable. *Oglesby*, 506. Constitutional question as to this statute, not decided. *Id.* Conviction warranted. *Glenn*, 585.
- Child abandonment, not penal if his wants be provided for by others. *Mays*, 507.
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- Circumstantial evidence; charge that the jury would be authorized to find the accused guilty unless there was some other hypothesis as reasonable as that he committed the act, error. *Campbell*, 534.
- Circumstantial evidence sufficient to establish venue. *McCoy*, 145.
- Circumstantial evidence. See catchword "Murder."
- Confessions. See *Evidence*.
- Constitutionality of act under which accusation was framed, not passed on, where the accusation was fatally defective. *Oglesby*, 506.
- Corporate name; proof allowed that "Tifton Knitting Mills," in indictment, referred to a corporation. *George*, 504.
- Corpus delicti not required to be proved before the introduction of other evidence against the accused. *Williams*, 138.
- Costs; convicted prisoner, not county, is liable for costs allowed for conducting prisoner before court. *Hall County v. Gilmer*, 173.
- Declaration of accused, self-serving, not admissible. *Williams*, 141.
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- Disturbing congregation assembled for divine worship; offense committed by shooting pistol near the congregation while they were at dinner on the church grounds. *Folds*, 167.
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- Forgery; sufficiency of allegations as to fraud, etc. *Id.*
- Forging or fraudulently altering teacher's license, sufficiency of indictment for. *Id.*
- Former conviction of similar offense, evidence as to, when inadmissible. *Bashinski*, 509.
- Fraud, sufficiency of allegations as to, in indictment for forgery. *Taylor*, 136.
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- Gaming, evidence sufficient to warrant conviction of. *Boaz*, 502; *Davis*, 502.
- Gaming; indictment charging different kinds conjunctively ("cards, dice, and balls"), supported by proof of one kind. 113 *Ga.* 928, disapproved. (Dissent.) *Hubbard*, 17.
- Gaming; indictment need not allege with whom the accused played; but proof of play with undisclosed persons will not support a conviction of one under a joint indictment. *Id.* 18.
- Gaming-house; indictment with two counts, one as to maintaining gaming-house, the other as to renting house to be used for gaming, not demurrable for misjoinder of offenses. *Bashinski*, 508.
- Gaming-house; proper instructions; evidence warranting conviction. *Groves*, 570.
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- Homicide, distinction between justifiable and excusable, abolished; refusal to charge as to when it would be "excusable," not error. *Id.*
- Homicide justifiable in "all other instances which stand upon the same footing of reason and justice," etc. (Penal Code, § 75); difference between common law and this statute. *Gossett*, 431.
- Homicide; Penal Code, § 73, should not be given in charge when there is nothing in the evidence or in the defendant's statement to support the theory of mutual combat. *James*, 548.
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- "Indecently acting," meaning of, in Penal Code, § 418; discharging pistol near congregation assembled for worship was. *Folds*, 167, 170.
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- Indictment, alterations in; when not cause for demurrer. *Allen*, 499.
- Indictment, conjunctive allegation in; charge of gaming with "cards, dice, and balls," not demurrable because the statute prohibits gaming with "cards, dice, or balls." *Hubbard*, 17.
- Indictment, demand for, made orally by counsel, insufficient; it should be in writing, signed by the accused. *Shivers*, 538.
- Indictment for fraudulently procuring a named sum, "or the value thereof," demurrable. *Oglesby*, 506.
- Indictment, form of, in Penal Code, need not be followed literally; not necessary to give place of residence of accused. *Tarver*, 494.
- Indictment for renting house for gaming need not name tenant. *Bashinski*, 508.
- Indictment, misjoinder of offenses in. See catchwords "Gaming-house," *supra*.
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- Indictment, where grand juror was ineligible because not a resident of the county six months; what must appear to sustain plea in abatement. *Folds*, 167.
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- Insanity as defense. *Roberts*, 148; *Allams*, 500.
- Insanity; burden of proof as to. *Id.* 500.
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- Jeopardy former; judgment striking plea of, not reviewable by writ of error before judgment finally disposing of case. *McElroy*, 546.
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- Larceny after trust and simple larceny may be committed in the same transaction. *Martin*, 478.
- Larceny simple, conviction under accusation of, upheld, though the evidence also made out a case of larceny after trust. *Id.*
- Larceny, venue of. See catchword "Venue," *infra*.
- Liquor, keeping for sale; evidence warranting conviction. *Watts v. Forsyth*, 507. See catchwords "Municipal court," *infra*.
- Liquor selling, legislature may authorize city to punish for, when. *Littlejohn v. Stells*, 427.
- Liquor selling, special act to prohibit, invalid as in conflict with general law. *Edwards*, 542.
- Liquor selling without license, no conviction of, in county where sale prohibited altogether by valid statute; aliter where prohibited by unconstitutional act. *Id.*
- Malice, declarations tending to show. *Roberts*, 148; *Campbell*, 533.
- Manslaughter, charge to jury on, proper here. *Jenkins*, 523. Not required here. *Clements*, 547. Not authorized where facts show murder or no crime. *James*, 548. Not improper where statement of accused presented theory of. *Grimes*, 754.
- Manslaughter involuntary, charge to jury on, not warranted by evidence here. *Nelms*, 575.
- Manslaughter, verdict of, unsupported, where evidence showed murder or complete justification. *James*, 548.
- Manslaughter voluntary, passion on part of slayer is an essential element of; passion on part of person slain had no bearing on the grade of homicide here. *Renfrow*, 530.
- Maxim that it is better that ninety-nine guilty escape than that one innocent man should suffer, not proper to give in charge to jury. *Mixon*, 582.
- Merger of crimes, common-law rule as to, where one is misdemeanor and the other a felony, not prevail in this State. *Martin*, 479.
- Misjoinder of offenses. See catchwords "Gaming-house," *supra*.
- Mistrial on account of woman crying, not declared; assignment of error, insufficient. *Clements*, 547.
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Words in female's hearing are in her presence; charge to this effect, not error, especially in view of charge as to burden to show defendant's knowledge of her presence. *Roberts*, 505.

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Description, repugnance in; number of acres not control, here. *Collinsville Co. v. Phillips*, 839.

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Description too indefinite, in bond for title, obligor suing for purchase-money can not object. *Strickland v. Hutchinson*, 399.

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Easement, not fee, passed, under deed conveying perpetual right to use of stairway in common with grantor, though words appropriate to a conveyance in fee were used. *Bale v. Todd*, 99.

Exception in, as to granite, construed. *Collinsville Co. v. Phillips*, 831.

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Estoppel by acquiescence in; heirs not held to have acquiesced in executor's unauthorized deed of which they had no notice. *Hosch Lumber Co. v. Weeks*, 386.

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Power of attorney authorizing conveyance of "all real estate belonging to us, or in which we have any interest, situated in the State of Georgia," not too indefinite. *Lanier v. Hebard*, 626.

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Repugnant clauses, in description; recital as to quantity of land, not control, when. *Collinsville Co. v. Phillips*, 841.

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Tax deed, effect of; no title acquired by one who, after record, redemption, and expiration of redemption period, bought from the vendee, without notice of redemption, though the owner had not taken a reconveyance. *Bennett v. So. Pine Co.* 618.

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Assignment of, by order of court, not essential, where commissioners admeasured the land, and the widow took possession, with acquiescence of all concerned. *Callaway v. Irvin*, 844.

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Remedy for interference with, not action of trespass or ejectment. *Bale v. Todd*, 103.

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Administrator made prima facie case by proving appointment and order to sell, where defendant admitted title in the intestate, pleaded contract of purchase from him, and prayed specific performance. *DeBignon v. Finch*, 616.

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Accident and mistake; consent decree not set aside at instance of consenting party alleging that, through accident and mistake, evidence in his possession which would have authorized a different decree was not introduced. *Gray v. Wright*, 295.

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City court has no jurisdiction as to affirmative equitable relief. *Ragan v. Standard Scale Co.* 14. Equitable plea entertained, when. *House v. Oliver*, 784.

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Election-contest proceeding can not be annexed to a suit in equity, and such a suit can not be converted by amendment into a proceeding of that character. *Ogburn v. Elmore*, 677.

Laches, as bar to relief. *City of Elberton v. Pearle Mills*, 1; *Weslosky v. Quarterman*, 312.

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Reformation of instrument, as a general rule, not decreed at instance of one not a party to it, but a mere volunteer. *McWhorter v. O'Neal*, 247.

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Specific performance not decreed as to contract for sale of land, where the land is so vaguely described that the writing furnishes no key to its identification. *Tippins v. Phillips*, 415.

Specific performance not decreed as to naked promise in parol, though the promisor encouraged the other party to expend money on the faith of it, the expenditures being for his own benefit, not that of the promisor, who was not benefited. *Swan Co. v. Linder*, 550.

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Specific performance; when not necessary for vendee to allege tender of deed for execution; rule as to tender of deed where vendor sues. *Wellmaker v. Wheatley*, 204.

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"Family," meaning of, in bequest. *Fulghum v. Strickland*, 260, 262.

Fee-simple estate not conveyed by use of words appropriate to conveyance of, where a different intent appeared. *Bale v. Todd*, 99.

Fee subject to be divested by death without leaving child was created by devise here. *Hill v. Terrell*, 49.

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Merger of, conveyance of life-estate to remaindermen. *Rosier v. Nichols*, 24.

Power of appointment by will, conferred by deed on life-tenant, as to the whole estate, was extinguished by conveyance to remaindermen here. *Id.* 21, 24.

Power of life-tenant to authorize trustee to sell, lost by her conveyance to remaindermen. *Id.* 25.

Remainder; bequest to daughter's children, with provision that the share of any of them dying without a child should revert to the survivors, did not create remainder in a child of one of them. *Hill v. Terrell*, 49.

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Citizen whose conduct induces city authorities to believe he will not question validity of ordinance vacating street, not estopped from attacking it before definite action is taken under it by parties interested in giving it effect. *Coker v. R. Co.* 483.

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Delay of objection until after construction of waterworks, ground for refusing to enjoin use of water. *City of Elberton v. Pearle Mills*, 1.

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Title, estoppel to assert, not result from knowledge of illegal sale here. *Smith v. McWhorter*, 287.

Title, wife not estopped from setting up, as against one asserting lien for material furnished for improvement of the property at instance of husband representing that he was owner, when. *Reaves v. Meredith*, 444.

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- Acts tending to show a continuous course of conduct, admissibility of, to show motive. *Roberts v. State*, 146, 157; *Campbell v. State*, 533.
- Admission of relevant evidence at any stage of case is never ground for new trial. *Boston Mercantile Co. v. Ould-Carter Co.* 458.
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- Affidavits not filed in injunction case three days before hearing, as required by judge's order, admitted in evidence; discretion of court not abused. *Id.* 464.
- Agent's declarations, admissibility of. Civil Code, § 3034, construed, as to declarations of deceased agents; did not change prior law. 56 *Ga.* 638, not followed. *Turner*, 5.
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- Amount; evidence too indefinite to warrant verdict for fixed amount, though authorizing a finding that some amount was due. *Clegg Lumber Co. v. A. & B. R. Co.* 603.
- Answer (pleading), rebuttal of, by two witnesses, or by one and corroborating circumstances; rule as to, applies only where discovery is prayed for. *Toomer v. Warren*, 477.
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- Circumstantial. See *Criminal Law*, catchwords "Circumstantial evidence."
- Competency of witness. See *Witness*.
- Complaints, admissibility of, in action for personal injury; testimony that plaintiff "complained" and said she had received a jolt, admitted. *W. & A. R. Co. v. Burnham*, 29. That the plaintiff complained "immediately" after the accident, too indefinite as to time. *Pool v. Warren County*, 205.
- Conclusion, statement here as to distance being more than ordinary step of person making an average step, objectionable as. *Seaboard Ry. v. Olsen*, 612.
- Conclusion, testimony that a person appeared to be excited, or did not so appear, not inadmissible as. *Roberts v. State*, 146.
- Confession not excluded because made while under arrest. *Folds*, 169.
- Confidential communications, rule as to, when not applied to attorney. *Turner*, 6.
- Construed against party testifying, when self-contradictory, vague, or equivocal. *Steele v. Cen. R. Co.* 237.
- Copy certified, not parol, proper mode of proving contents of petition filed in court of record of another county. *Parker v. Ballard*, 441.
- Copy of record from other State, authentication of. *Conrad v. Kennedy*, 242.
- Corpus delicti not required to be proved before the introduction of other evidence against the accused. *Williams v. State*, 138.
- Credibility of witnesses. See *Charge of Court*.
- Death as affecting competency. See *Witness*.
- Declaration of debtor, made to creditor, that he had made certain misrepresentations to obtain credit, admissibility of, on trial of issue as to whether his return of goods was an illegal preference. *Silbey v. Tift*, 814.
- Declaration self-serving, by one accused of crime, not admissible. *Williams v. State*, 141.
- Declarations and conduct of accused prior to homicide, admissible to show malice or motive. *Roberts v. State*, 146; *Campbell v. State*, 533.
- Declarations as to relationship, admissibility of. *Lanier v. Hebard*, 626, 633.
- Declarations of agent. See catchwords "Agent's declarations," supra.
- Declarations of decedent, admissibility of. *Turner*, 6, 6.
- Declarations of defendant in fi. fa. in claim case, when admissible. *Smiley v. Padgett*, 39.
- Declarations of testator after date of alleged will, that if he signed it he did not know what he was doing, admissible merely to show his mental condition at the time it purported to have been signed. *Credille*, 678.
- Declarations to one of affection for another, not admitted. *McWhorter v. O'Neal*, 251.
- Declarations. See catchwords "Complaints," "Res gestæ."

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Deed recitals, as evidence. *Lanier v. Hebard*, 626.

Depositions; where plaintiff gave notice that depositions would be taken at a stated time and place, and failed to appear, depositions then and there taken without notice to him, on what was called "cross-examination," were not admissible. *Hosch Lumber Co. v. Weeks*, 341.

Depositions. See catchword "Interrogatories," *infra*.

Entries by agents or decedents, admissibility of. *Turner*, 5, 6.

Error in admitting, cured by evidence afterwards admitted. *Roberts v. State*, 157. Cured by ruling it out and instructing jury to disregard it. *Rentfrow v. State*, 539.

Excitement, appearance of, or the contrary, admissibility of testimony as to. *Roberts v. State*, 146.

Exemplification of record from another State, authentication of. *Conrad v. Kennedy*, 242.

Expert, defined; one may be a medical expert without being a licensed physician. *Mac. R. Co. v. Mason*, 773, 778.

Expert testimony, error in charge requested as to. *Williams v. State*, 138.

Facts that must be known to jury as matters of human experience, evidence as to, rejected as unnecessary. *Sheftall v. Cen. R. Co.* 598.

Feelings, effect on, testimony as to, unnecessary, and properly rejected, in libel case. *Id.*

Fire from locomotive, causing grass to burn, admissibility of evidence as to. *Hendricks v. So. R. Co.* 342.

Former conviction, evidence as to, when inadmissible. *Bashinski v. State*, 509.

Fraud as against creditors, in conveying land, evidence as to, excluded, where offered by one not a creditor, for the purpose of attacking the deed. *Moore v. Mobley*, 424.

Gaming, admissibility of evidence on trial for renting house to be used for. *Bashinski v. State*, 508.

Hearsay. See catchwords "Complaints," "Declarations," *supra*.

Impeaching, error in admitting, not require new trial here. *Whipple v. State*, 580.

Intention of parties at time of making contract, testimony as to, inadmissible, where contract unambiguous. *McWhorter v. O'Neal*, 251.

Interrogatories; deficiencies in formal requisites as to, not supplied by counsel's statement in court. *Hosch Lumber Co. v. Weeks*, 341.

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Interrogatories, form of; greater liberality allowed as to, than as to questions to witness on the stand. *Phinazee v. Bunn*, 232.

Interrogatories leading; discretion as to allowing answers read. *Id.* 23.

Interrogatories not properly executed and returned can not, without order for re-execution, be taken from clerk's office by counsel and sent to commissioners, to be again returned. *White v. So. R. Co.* 353.

Interrogatories. See catchword "Depositions," *supra*.

Irrelevant, as to facts not shown to have been brought to knowledge of accused, here. *Gossett v. State*, 431.

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- Irrelevant, not require new trial, here. *McWhorter v. O'Neal*, 251.
- Judicial cognizance taken that a county is a body corporate. *Taylor v. State*, 136. Of the dates fixed by law for the beginning of the sessions of the superior courts. *Edwards v. State*, 542.
- Leading question to witness, discretion as to allowing. *Phinazee v. Bunn*, 232.
- Letters, evidence insufficient to show that a certain person wrote them. *Campbell v. State*, 533.
- Libel, injurious effect of, on feelings of members of family of person libeled, evidence as to, properly rejected. *Sheftall v. Cen. R. Co.* 598.
- Lost writings, witness unable to state contents literally, allowed to state substance. *Campbell v. State*, 533.
- Marriage promise, neither party to suit for breach of, is a competent witness on the trial. *Graves v. Rivers*, 224.
- Marriage proposal and acceptance, circumstances sufficient to show. *Id.* 229.
- Motive, admissibility of evidence as to declarations or a line of conduct by accused, tending to show. *Roberts v. State*, 146; *Campbell v. State*, 533.
- Narrative without questions, not an objectionable form of testifying. *Horton v. State*, 145.
- Newly discovered, as ground for new trial. See *New Trial*.
- Oath omitted before testifying, objection waived by delay; no error in allowing witness recalled, to testify under oath; his sworn statement, that what he said before was true, sufficient in absence of objection. *So. R. Co. v. Ellis*, 614.
- Objection to, interrupted by court saying objecting counsel could show on cross-examination that the testimony was improper; effect of failure to make subsequent motion to exclude. *Williams v. State*, 128. See *Whipple v. State*, 581.
- Objection to, waiver of, by delay until after conclusion of testimony. *So. R. Co. v. Ellis*, 614.
- Objection to, what must appear, to be considered. See *New Trial*, catchword "Grounds."
- Opinion of one whose experience and studies qualified him to give an opinion as a medical expert, admitted, though he was not a licensed physician. *Mac. R. Co. v. Mason*, 773.
- Opinion. See catchword "Conclusion," supra.
- Order in which introduced, discretion of court as to. *Williams v. State*, 140; *Boston Mercantile Co. v. Ould-Carter Co.* 458.
- Parol agreement that certain fixtures should not pass by a conveyance of the reality, whether admissible. *Wolff v. Sampson*, 403.
- Parol, as to consideration of contract; rule allowing proof of consideration different from that expressed, not apply where the consideration expressed is mutual promises therein. *Wellmaker v. Wheatley*, 201.
- Parol contract for sale of land, degree of proof required to establish, where specific performance is sought. *Warren v. Gay*, 243.
- Parol, not admissible to prove contents of petition filed in court of record of another county. *Parker v. Ballard*, 441.
- Parol, not admitted to graft condition on note. *Union Cen. Ins. Co. v. Wynne*, 470.

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- Parol, to identify land referred to in contract, when admissible. *Wellmaker v. Whealley*, 204.
- Parol, to show intention of parties at time of making contract, not admissible, where the contract is unambiguous. *McWhorter v. O'Neal*, 251.
- Parol, to show that a written contract does not set forth the real undertaking, not admissible in absence of pleadings asking for reformation. *Wellmaker v. Wheatley*, 201.
- Party, incompetency of, to testify. See *Witness*.
- Party not entitled to recover on his own testimony, if most unfavorable version of it calls for verdict against him. *Steele v. R. Co.* 237.
- Pedigree, admissibility of declarations as to. *Lanier v. Hebard*, 633.
- Positive and negative, proper charge as to. *Nelms v. State*, 576.
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- Question leading. See catchword "Interrogatories."
- Question to witness, as to whether another witness was mistaken if he made a certain statement; refusal to allow, not error here. *Campbell v. State*, 533.
- Record from another State, authentication of. *Conrad v. Kennedy*, 242.
- Relationship, admissibility of declarations or recitals as to. *Lanier v. Hebard*, 626, 632.
- Reopening case to receive, discretion as to. *Roberts v. State*, 146.
- Res gestæ; "immediately," too indefinite, in testimony as to time of declaration. *Pool v. Warren County*, 206.
- Res gestæ; statement made a half hour after injury, by injured person, as to the circumstances under which it occurred, not admissible as. *White v. So. R. Co.* 353.
- Res gestæ. See catchword "Complaints," supra.
- Ruling as to admissibility postponed, party desiring ruling should again call attention to the matter. *Whipple v. State*, 581.
- Sale parol, of land; degree of proof required to establish. *Warren v. Gay*, 243.
- Seduction, admissibility of evidence as to, on trial of action for breach of promise of marriage. *Graves v. Rivers*, 224.
- Sexual immorality, admissibility of testimony as to, where defense in homicide case was that it was committed to protect virtue of female. *Gossett v. State*, 431.
- Suppression of, agreement for purpose of. *Bailey v. Devine*, 656.
- Testator's declarations, admissibility of. *Credille*, 673.
- Title, declarations as to, by defendant in fi. fa., in claim case, when admissible. *Smiley v. Padgett*, 39.
- Title; testimony as to ownership of granite, not admitted. *Collinsville Co. v. Phillips*, 832.
- Tracks, as a circumstance to show guilt. *Parks v. State*, 164; *Williams v. State*, 278; *Whipple v. State*, 580.
- Weapon; broken curtain pole found behind a trunk near deceased, admissible on trial for murder here. *Roberts v. State*, 146.
- Will attested by only two witnesses, judgment of probate excluded. *Janes v. Dougherty*, 43.
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Agreement parol, that certain fixtures should not pass by a conveyance of the realty, whether sufficient. *Wolff v. Sampson*, 403.

Counters used in a store passed by a conveyance of the realty, though not attached to the building. *Id.* 400, 402.

Gas fixtures placed by tenant, removable by him in the absence of agreement. *Id.* 404.

Relation of parties, as affecting question whether articles are removable or not. *Id.* 402.

Trade fixtures, when removable and when not. Rule as to grantor and grantee, different from that as to landlord and tenant. *Id.*

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Debt of another, assumption of; allegations as to agreement and consent of the creditor, insufficient to show that he was party to agreement of substitution, not take case out of the statute. *Palmetto Mfg. Co. v. Parker*, 798.

Demurrer not sustained because of failure to show compliance with, non-compliance not appearing. *Union Cen. L. Ins. Co. v. Wynne*, 470.

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Claimant giving bond to dissolve, in attachment case, becomes a party to all subsequent proceedings, and may take advantage of any defect in his adversary's pleadings. *Callaway v. Maxwell*, 208.

Notice of traverse to answer, not given in due time, refusal to postpone trial in order to allow further time for notice. *Sims v. Price*, 98.

Traverse of answer to, dismissed for want of due notice. *Id.*

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Deed to realty, reserving "all the granite on said lot," construed; covered not merely granite exposed when the deed was made. *Collinsville Co. v. Phillips*, 831.

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HOMESTEAD AND EXEMPTION.

Bankruptcy, as affecting waiver of. See *Bankruptcy.*

Credit extended on faith of apparent ownership of property in which homestead proceeds invested, equitable title of beneficiaries not prevail as against creditor's right to subject the property to payment of his claim. *Reed v. Holbrook*, 781.

Dependent condition of adult female beneficiary, not keep alive homestead after death of head of family. *Jones v. McCrary*, 282.

"Family," how constituted, under constitution of 1868. *Id.*

Record of homestead proceeding, not notice of beneficiary's equitable title to land bought with proceeds of. *Reed v. Holbrook*, 781.

Waiver, good as to personalty claimed as exempt under Civil Code, § 2864, where not set apart by the ordinary in the manner prescribed as to the homestead allowed by the constitution. Ruling in 68 Ga. 252 followed, but doubted. *Miller v. Almon*, 104.

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HUSBAND AND WIFE. See *Dower; Homestead; Year's Support.*

Agency of husband for wife, what sufficient to show. *Pinkston v. Cedar Hill Co.* 303.

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Benefit to wife, as affecting liability for goods bought by husband. *Pinkston v. Cedar Hill Co.* 303.

Credit extended to husband, wife liable as undisclosed principal, when. *Id.* 302.

Dead body of husband, rights of widow as to; action against carrier for negligence in transportation of. *L. & N. R. Co. v. Wilson*, 62.

Sale order, where wife was beneficiary under will probated prior to married woman's act of 1866; husband's consent, where he had taken no step to enforce marital rights, not take place of her consent. *Callaway v. Irvin*, 345.

Sale to husband, liability of wife as undisclosed principal. *Pinkston v. Cedar Hill Co.* 302.

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Title, wife not estopped from setting up, as against one asserting lien for material furnished for improvement of the property at instance of husband representing that he was owner, when. *Reaves v. Meredith*, 444.

Widow sole heir at law, right of, to possession of husband's estate without administration. *Jackson v. Green*, 254; *Harrell*, 267.

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INJUNCTION. See *Counties*; *Nuisance*.

Action in city court not enjoined in order that decree for cancellation of note sued on might be obtained in superior court; equitable defense could be set up in city court. *House v. Oliver*, 784.

Affidavit by attorney, to petition for, that of his own knowledge the recitals of fact therein are true, sufficient. *Boston Mercantile Co. v. Ould-Carter Co.* 458.

Affidavits not filed three days before hearing, as required by judge's order, admitted in evidence; discretion of court not abused. *Id.*

Agent or caretaker of premises for owner had no such interest as would entitle him to, against dispossessory proceeding by third person. *Chatfield v. Clark*, 867.

Assignment of error as to judgment on petition for, what sufficient. *Ander-son v. Newton*, 518.

Bankruptcy, as affecting petition for, under insolvent trader's act. *Boston Mercantile Co. v. Ould-Carter Co.* 458.

Bankrupt's exemption, petition by holder of homestead-waiver note, for injunction, etc., as to property set apart as. *Toomer v. Warren*, 477.

Bankrupt's trustee not granted injunction against sale under mortgage *fi. fa.*, under facts here. *Parks v. Baldwin*, 869.

Condemnation for street across railroad, injunction against. *Town of Poulan v. A. C. L. R. Co.* 605.

Contract ultra vires, by city, partly performed by other party; city not enjoined from restoring such fruits of the contract as remain in its custody. *Coker v. Atla. R. Co.* 488.

Damage, evidence conflicting as to whether any would result, refusal of injunction affirmed. *City of Elberton v. Pearle Mills*, 1.

Delay in applying for, as affecting right to. *Id.*

Demurrer to petition for; judgment overruling, on interlocutory hearing in vacation before appearance term, a nullity. *Toomer v. Warren*, 477.

Discretion not abused in granting. *Jones v. Gammon*, 47.

Easement, injunction as remedy for interference with. *Bale v. Todd*, 108.

Forcible entry proceeding by non-resident, injunction against, in county in which instituted. *Ellis v. Stewart*, 242.

Injury to plaintiff, present or prospective, necessary, to authorize. *Clark v. Cline*, 864.

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- Insolvent corporation, sufficiency of petition against, under insolvent trader's act; misjoinder of parties. *Boston Mercantile Co. v. Ould-Carter Co.* 458.
- Legal remedy adequate, injunction against establishment of road not granted. *A. & W. P. R. Co. v. Redwine*, 736.
- Modification of, directed in affirming judgment. *Town of Poulan v. R. Co.* 612.
- Municipal ordinance, injunction against enforcement of, error to grant, here; applicant could assert his rights by defense against prosecution under it. *City of Sylvania v. Hilton*, 754.
- Nuisance, modification of injunction against, to give time to abate, no abuse of discretion. *Phillips v. DuBignon*, 17.
- Receiver granted injunction to restrain unauthorized interference with property in his possession. *Vestel v. Tasker*, 218.
- Receiver's petition for, entertained without express authority being first granted to bring suit. *Id.*
- Street across railroad, injunction against opening. *Town of Poulan v. A. C. L. R. Co.* 605.
- Taxpayer's right to, to prevent improper expenditure of public funds. *Clark v. Cline*, 864.
- Trespass by cutting timber, injunction against. See *Trespass*.
- Verification of petition for. *Boston Mercantile Co. v. Ould-Carter Co.* 464.
- Water rights, injunction against interference with, when granted. *City of Elberton v. Pearle Mills*, 1.

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- Action construed to be on policy, not on written adjustment of loss and promise to pay amount shown by adjustment. *Ga. Co-op. Asso. v. Borchardt*, 181.
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- Agent's knowledge, when imputable to insurer. *Johnson v. Aetna Ins. Co.* 406.
- Agent's power to waive conditions of policy; limitations of, in policy, treated as referring to waivers made after its issuance. Ruling in 98 *Ga.* 266, reaffirmed. *Id.* 404.
- Assignment of policy without consent of insurer, after loss, not invalidate it, though the written transfer purport to be subject to such consent; assignee may sue on the policy. *Ga. Co-op. Asso. v. Borchardt*, 181.
- Conditions of policy, waiver of, by agent. *Johnson v. Aetna Ins. Co.* 404.
- Corporation imported by name, "The Georgia Co-operative Fire Association." *Ga. Co-op. Asso. v. Borchardt*, 181.
- Estoppel to rely on agent's waiver. Ruling in 116 *Ga.* 122, criticised. *Johnson v. Aetna Ins. Co.* 408.

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Ownership of ground on which insured building stands, not in policy-holder, effect of agent's knowledge as to. *Id.*

Parol agreement as to policy, proof of, not admissible to show failure of consideration of note for premium, when. *Union Gen. Ins. Co. v. Wynne*, 470.

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Accident and mistake, as ground for setting aside. See catchwords "Setting aside," *infra*.

Agreement by party in one case to abide result of another, rendered judgment in the other final as to him; application to set aside the agreement, refused. *Jarrett v. McLaughlin*, 256.

Alimony order, revision of; when no sufficient reason for modifying. *Sumner*, 118.

Attachment, void, where no declaration filed at first term. *Callaway v. Maxwell*, 200.

Bankruptcy adjudication, effect of, as estoppel, discussed. *Silvey v. Tift*, 804, 807.

Cancellation of note effected by judgment in favor of one sued on it. *House v. Oliver*, 784.

Conclusiveness of adjudication in bankruptcy. *Silvey v. Tift*, 804, 807.

Conclusiveness of, on demurrer. See catchword "Demurrer," *infra*.

Conclusiveness, rules as to, stated; no estoppel where it appeared that several defenses were pleaded and it did not appear on which issue the judgment was rendered. *Callaway v. Irvin*, 335, 351.

Default entry defaced by judge, treated as inadvertent. *Albany Pine Products Co. v. Hercules Mfg. Co.* 270.

Demurrer, estoppel by judgment on. *Richmond Hosiery Mills v. W. U. Tel. Co.* 216; *Sims v. Ga. Ry. Co.* 643; *Cross v. Coffin-Fletcher Co.* 820.

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Final, on certiorari, when not to be rendered. *Bass Co. v. Electric Co.* 641.

In rem, effect of. *Silvey v. Tift*, 808.

Premature; judgment overruling demurrer to petition for injunction, on interlocutory hearing in vacation before appearance term, a nullity. *Toomer v. Warren*, 470.

Presumption in favor of, that all jurisdictional facts were made to appear to the court; when not arise. *Callaway v. Irvin*, 348.

Res judicata; allegation of estoppel by judgments referring to attached copy of record, too indefinite, here. *Silvey v. Tift*, 806.

Res judicata. See catchword "Conclusiveness," *supra*.

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Revision of order for temporary alimony must be based on a change of circumstances, occurring after the order has been granted. *Sumner*, 118.

Revision or review of, after term at which rendered, not allowed. *Sims v. Ga. Ry. Co.* 643, 645.

Scire facias to revive; personal service necessary. *Atwood v. Hirsch*, 734.

Setting aside; consent decree not set aside at instance of consenting party alleging that, through accident and mistake, evidence in his possession which would have authorized a different decree was not introduced. *Gray v. Wright*, 295.

Special, against land, cause of action not changed by amendment praying for, here. *Wright v. Horne*, 86.

Void, against municipal corporation, where process was against individuals described as "mayor," "councilmen," etc., and acknowledgment of service was similarly signed. *Meyer v. Jordan*, 672.

Void judgment of probate, as to will attested by only two witnesses. *Janes v. Dougherty*, 44.

Void, order of sale passed in vacation was, under facts here, and subject to collateral attack. *Callaway v. Irvin*, 344.

JUDICIAL COGNIZANCE. See *Evidence*.**JURISDICTION.** See *Courts*; *Removal of Cause*.

Consent not confer, on city court, to grant affirmative equitable relief. *Ragan v. Standard Scale Co.* 14.

Domicile, facts determining. *Redfearn v. Hines*, 391. Of child. *Hayship v. Gillis*, 265.

Forcible-entry proceeding by non-resident, injunction against, in county in which instituted. *Ellis v. Stewart*, 242.

Foreign corporation that has agents located and doing business in Georgia is suable like domestic corporations, by resident or non-resident, on any transitory cause of action, whether originating there or not. *Hawkins v. Fidelity Co.* 722.

Guarantor may be sued in the county of his residence. *Fields v. Willis*, 272.

Non-resident, injunction against proceeding instituted by. *Ellis v. Stewart*, 242.

Partitioning of land lying in different counties. *Fletcher*, 327.

"Pending proceeding," under Civil Code, § 4823, forcible-entry proceeding is. *Ellis v. Stewart*, 242.

Venue; a private business corporation created under Georgia law, with principal office in a certain county, is not suable in another county for a tort committed there, when it has no agent, agency, or place of business there. *Tuggle v. Enterprise Co.* 481.

Venue. See *Criminal Law*.

JURY. See *Charge of Court*; *Verdict*.

Disqualification by relationship to county commissioner, in suit against county, not exist where he defends merely in official capacity and has no pecuniary interest therein other than as a citizen. *Pool v. Warren County*, 205.

Disqualification of grand juror, when waived by failure to challenge before indictment found. *Folds v. State*, 167.

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Grand juror not a resident in the county six months before service, ground of challenge *propter defectum*. *Id.*

Municipal court, one arraigned in, for violation of ordinance, is not entitled to jury trial. *Littlejohn v. Stells*, 427; *Little v. Fort Valley*, 503.

Right of trial by, of exceptions to auditor's report. See *Auditor*.

Waiver of disqualification. *Folds v. State*, 167.

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Accounts; mode of proof and defense provided in Civil Code, § 4180, not apply to suit against common carrier for loss of or damage to goods. *Lowe Co. v. Cen. R. Co.* 712.

Amendment of docket entry, directed in sustaining certiorari. *Bates v. Bigby*, 781.

Docket entry different from summons, as to party, not invalidate judgment here. *Id.*

Jurisdiction of suit for personalty received by defendant as bailee. *Id.* 727.

Vacancy in office; magistrate whose resignation has been accepted continues in office until appointment and qualification of successor. *Id.*

LABORERS. See *Criminal Law*, catchword "Cheating;" *Master and Servant*.

LACHES. See *Equity*.

LANDLORD AND TENANT.

Agent or caretaker for owner was not entitled to bring action in his own name to enjoin dispossessionary-warrant proceeding of another against him. *Chatfield v. Clark*, 867.

Agreement to give tenant "refusal" of premises, or of buying premises, effect of. *Wellmaker v. Wheatley*, 202.

Contract as to right of tenant to cut wood, construed. *Jones v. Gammon*, 47.

Crop; tenant's portion set apart to widow as year's support, she could recover in trover from one to whom landlord entitled to fourth of crop for rent had delivered it before set part, in payment of debt of the tenant. *Neal v. Smith*, 26.

Damage from defective construction or disrepair of rented house, landlord's liability for; sufficiency of allegations in suit for. *Veal v. Hanlon*, 642; *Ross v. Jackson*, 657.

Dispossessionary warrant not lie against one who entered under deed, claiming the land in good faith. *Sharpe v. Mathews*, 794.

Distress lies only where the relation of landlord and tenant exists between the parties. *Sims v. Price*, 97.

Fixtures placed by tenant, when removable. See *Fixtures*.

Injunction to prevent tenant from cutting wood. *Jones v. Gammon*, 47.

Parties to eviction, tenant and subtenant joined as, when. *Fletcher*, 470.

Relation of, not exist between parties one of whom entered under a third person holding adversely to the other. *Sims v. Price*, 97.

Relation of, when implied. *Sharpe v. Mathews*, 797.

Repairs, duty of landlord as to. *Veal v. Hanlon*, 642; *Ross v. Jackson*, 657.

Subtenant holding beyond original tenant's term, properly joined with him as defendant; judgment against both for possession, and against original tenant for double rent. *Fletcher*, 470.

LANDLORD AND TENANT—*continued.*

Sufferance, tenancy at, defined. *Sharpe v. Mathews*, 798.

Title adverse to landlord can not be set up by tenant or subtenant before surrender of possession to the landlord. *Fletcher*, 473.

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Bill of exceptions direct, without motion for new trial, not lie as to rulings not necessarily controlling verdict. 119 *Ga.* 395, disapproved. (See dissent.) *Henderson v. State*, 739.

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- Evidence; affidavits or other documents not properly identified, or not made part of brief of evidence, not considered, though specified in bill of exceptions. *Town of Poulan v. A. C. L. R. Co.* 606; *Roberts v. Heinsohn*, 685.
- Evidence, agreement of counsel not cause court to consider stenographic report not approved by trial judge as brief of. *George v. State*, 504.
- Evidence, brief of, not filed before time for hearing motion for new trial, ground for dismissing the motion, not for dismissing writ of error. *Rigell v. Sirmans*, 455.
- Evidence, brief of, not in legal form, or not appearing to have been approved, exceptions dependent on it not considered. *McComb v. Hines*, 246; *Stansell v. Bank*, 278.
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Action against, by recipient of message, for failure to transmit it correctly, not lie; he must look to the sender for damages. *Richmond Hosiery Mills v. W. U. Tel. Co.* 216.

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Possession under claim of ownership gives right to maintain action against trespasser. *Fletcher*, 325.

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- Educational, superior court has plenary power over; judge may fill vacancies in trusteeship where no provision therefor is made by grant or legislative act; this done on petition of beneficiaries. *Id.*
- Joint act of coexecutors necessary, to execute special trust created by will. *Hosch Lumber Co. v. Weeks*, 836.
- Married woman, life-tenant, trust created for, executed on delivery of deed. *Rosier v. Nichols*, 20; *Smith v. McWhorter*, 287.
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- Parties, church trustees only necessary defendants, to subject church property here. *Kelsey v. Jackson*, 118.
- Power of sale may reside in one who has no legal or equitable interest in the property. *Rosier v. Nichols*, 24.
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